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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-747

THE NAVAJO TRIBE, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
1. Jurisdiction Misconstrued; Special Claims Contract Ignored; Conflict with Established Precedents	10
2. Misinterpretation of Amended Petition	15
3. Unwarranted Emasculation of Seventh Claim	19
CONCLUSION	23
APPENDIX A (Opinion of the Court of Claims, June 13, 1979)	1a
APPENDIX B (Order of the Court of Claims, September 28, 1979)	9a
APPENDIX C (Petition, No. 69, filed July 11, 1950)	11a
APPENDIX D (Special Claims Contract, July 1, 1968)	51a
APPENDIX E (First Amended Petition, No. 69, filed October 1, 1969)	57a
APPENDIX F (Opinion of the Indian Claims Commission, January 23, 1975)	59a
APPENDIX G (Opinion of the Trial Judge, January 23, 1978)	65a

CASES: Page

Green v. Menominee Tribe, 233 U.S. 558 (1914) 14
Holker v. Parker, 11 U.S. (7 Cranch) 436 (1813) 13
In re Sanborn, 148 U.S. 222 (1893) 11
McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 18
Marlin v. Lewallen, 276 U.S. 58 (1928) 18
Menominee Tribe v. United States, 391 U.S. 404 (1968). 18
Navajo Tribe v. United States, —— Ct. Cl. ——, 601 F.2d 536 (1979) 1, 9
Navajo Tribe v. United States, Ct. Cl. No. 69 (Claims 1 through 6 and 8), Order of September 28, 1979 ... 2, 8
Navajo Tribe v. United States, 31 Ind. Cl. Comm. 40 (1973) 7, 17
Navajo Tribe v. United States, 34 Ind. Cl. Comm. 432 (1974) 8
Navajo Tribe v. United States, 35 Ind. Cl. Comm. 305 (1975) 8, 11, 15
Navajo Tribe v. United States, 36 Ind. Cl. Comm. 215 (1975) 8
Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927) 14
Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975) 18
Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) .. 20
Seminole Nation v. United States, 316 U.S. 286 (1942).. 18
Sioux Tribe v. United States, 146 F.Supp. 229 (1956), *vacated*, 182 Ct. Cl. 912 (1968) 14
Snoqualmie Tribe v. United States, 178 Ct. Cl. 570, 372 F.2d 951 (1967) 21
Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 136 (10th Cir. 1966) 13
Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966) 6
United States v. Beebe, 180 U.S. 343 (1901) 13

Page

United States v. Ft. Sill Apache Tribe, 209 Ct. Cl. 433, 533 F.2d 531 (1976) 20
United States v. Kagama, 118 U.S. 375 (1886) 18
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 18

STATUTES:

U.S. CONSTITUTION, amend. V 2
Indian Reorganization Act of 1934, § 16, 25 U.S.C. 476. 4
Indian Claims Commission Act of 1946:
as amended, 25 U.S.C. § 70 *et seq.* 3
§ 12, 25 U.S.C. § 70k 9, 21
§ 15, 25 U.S.C. § 70n 3-4, 10, 14, 19
25 U.S.C. §§ 81-84 ..... 4, 10, 11, 19
28 U.S.C. § 1255 2
Pub. L. No. 94-465, 90 Stat. 1990 (1976) 8

RULES:

FED. R. CIV. P. 54(b) 20
GEN. R. P. OF IND. CL. COMM.:
7(a) 16, 20
13(a)(1) 17

MISCELLANEOUS:

RESTATEMENT OF JUDGMENTS (1942) 21
34 OP. ATT'Y GEN. 439 (1925) 18-19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Navajo Tribe petitions for a writ of certiorari to review the Opinion of the United States Court of Claims dated June 13, 1979, and the Order entered on petitioner's motion for clarification of that Opinion.

OPINIONS BELOW

This case involves the arbitrary dismissal of valuable claims against the United States in derogation of safeguards mandated by Congress for the protection of tribal claimants under the Indian Claims Commission Act. The Opinion of the Court of Claims (Appendix A) is reported at 601 F.2d 536 (1979). The Order (Appendix B) is unreported.

JURISDICTION

The Opinion below was entered on June 13, 1979. Petitioner filed a motion for clarification of the Opinion on September 4, 1979, and on September 11, 1979, the Chief Justice extended the time for filing this petition to November 10, 1979 (No. A-206). The Order on the motion for clarification was entered on September 28, 1979. The Court's jurisdiction is based upon 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims misconstrued its jurisdiction under the Indian Claims Commission Act to bar seven counts of an eight-count petition after their unauthorized "withdrawal" by petitioner's claims attorney in violation of his attorney's contract, which required prior approval by the Tribe and the Secretary of the Interior of any compromise, settlement or adjustment of a claim.

2. Whether the "withdrawal" of seven counts of an eight-count petition affects jurisdiction over claims stated by the remaining count, by barring all issues that may also have been presented by the "withdrawn claims."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the United States Constitution involved is the Fifth Amendment, which provides in relevant part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Congress mandated safeguards for tribal claimants under Section 15 [25 U.S.C. § 70n] of the Indian Claims Commission Act of August 13, 1946, c. 959, P.L. 79-726, 60 Stat. 1049, 1053, (the "Act"), which reads as follows:

> "§ 70n. Attorneys of claimants; selection, practice and fees; Attorney General to represent United States; compromise of claims.
>
> "Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 476 of this title, shall be selected pursuant to the constitution and by-laws of such tribe, band or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 81, 82, 83 and 84 of this title.

> "The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as part of its report as provided in section 70t of this title in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 70u of this title."

Petitioner is not organized under the Indian Reorganization Act, 25 U.S.C. § 476; therefore, its contract with its claims attorney is required to be approved by the Secretary of the Interior under 25 U.S.C. §§ 81 to 84. Section 81 provides in pertinent part:

> "No agreement shall be made by any person with any tribe of Indians, . . . for the payment or delivery of any money or other thing of value . . . in consideration of services for said Indians relative to their lands, or to any claims . . . in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it. . . ."

The Secretary required in the attorney contract that any compromise, settlement, or other adjustment of petitioner's claims be approved by his delegate and the Tribe.

STATEMENT OF THE CASE

Petitioner is by far the largest Indian tribe in the nation, with a population of approximately 150,000 or about one-fourth of the total American Indian population, and a reservation of 13 million acres encompassing lands in the states of Arizona, New Mexico and Utah. The magnitude and complexity of the Tribe's claims against the United States, as well as of its general legal problems, are commensurate with its extraordinary size. The claims dismissed by the decision below have been appraised by petitioner's expert witnesses well in excess of a hundred million dollars.

Petitioner timely filed its Petition under the Indian Claims Commission Act on July 11, 1950, as Docket No. 69 (Appendix C). The Petition contained eight counts or "claims" consisting of 29 numbered paragraphs plus a general prayer for relief in paragraph 30. Each count incorporated by reference the factual allegations of the preceding counts. Claims 1 through 6 and Claim 8 alleged specific breaches of treaties or fiduciary obligations by the United States and sought damages for the alleged breaches. Claim 7 alleged a trust or guardian-ward relationship between the Government and the Navajo Tribe and demanded a complete accounting of the Government's handling of tribal property and money which it held in trust. To the extent that the accounting sought in Claim 7 would reveal breaches of treaty or fiduciary duties that were specifically alleged in Claims 1 through 6 and Claim 8, Claim 7 presented an alternative theory for relief, *i.e.*, a suit for an accounting instead of an action for money damages.

Respondent never answered the Petition. On August 8, 10 and 11, 1951, petitioner timely filed petitions

docketed, respectively, as Nos. 229 (land claim), 299 and 353 (receipts accounting for certain resources), which reiterated some of the allegations of the Petition in No. 69. Because of the magnitude and complexity of the claims, petitioner's first claims counsel, Normal Littell, entered a stipulation with the Government providing that prosecution of claims in Nos. 69, 299 and 353 would be deferred pending completion of the land claim in No. 229.

In 1966, after lengthy litigation culminating in a decision of the United States Court of Appeals for the District of Columbia Circuit upholding the Secretary's supervisory power over tribal attorneys' contracts, Mr. Littell was fired from his position as general counsel for the Tribe by the Secretary of the Interior. *Udall* v. *Littell,* 366 F.2d 668 (D.C. Cir. 1966). Mr. Littell resigned as claims attorney shortly thereafter, on February 20, 1967. His successor, Harold Mott, also was permitted to assume the dual role of petitioner's general counsel and, by separate contract, claims counsel. His claims contract was approved by the Secretary of Interior on November 21, 1968. Section 6 of that contract (Appendix D) required that:

> "[a]ny compromise, settlement or other adjustment of a claim of the Tribe shall be subject to the approval of the TRIBE and the SECRETARY [of the Interior]." Appendix D at 5.

During the hiatus after respondent fired petitioner's first claims attorney, but before it approved the second, respondent filed (on November 14, 1967) in No. 69 a "Motion to Require Petitioner to Set Out in Separately Numbered Petitions the Claims Pleaded in the Original Petition or, in the Alternative, to Dismiss

the Petition." A response to that motion was not filed because petitioner had no attorney of record, and respondent then moved (on March 11, 1968) to dismiss the Petition for failure to prosecute. After approval of his contract, petitioner's second claims attorney responded (on December 13, 1968) to the latter motion, requesting an extension of time to respond to the earlier motion. On December 23, 1968, the Commission denied the motion to dismiss and gave petitioner nine months "to amend the petition" in No. 69.

On October 1, 1969, petitioner's claims attorney filed a First Amended Petition in No. 69 (Appendix E), as follows:

> "The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth and eighth claims."

The deleted paragraphs comprised particular allegations of damages; none of the allegations of fact was deleted, nor was the general prayer for relief at paragraph 30. The withdrawal of "claims" was not approved by petitioner or by the Secretary of the Interior. Respondent filed its Answer to First Amended Petition on November 4, 1969, but it did not seek entry of a final judgment dismissing the seven "withdrawn" claims, and the claims were never actually dismissed before the Opinion below.

On July 25, 1973, the Commission consolidated No. 69 with Nos. 299 and 353 because "plaintiff's allegations in Docket Nos. 299 and 353 clearly overlapped those filed in Docket No. 69." 31 Ind. Cl. Comm. 40, 41-42. On respondent's motion for rehearing (raising

other issues), the Commission confirmed the consolidation in its 1973 Opinion. 34 Ind. Cl. Comm. 432 (1974).

Petitioner's second claims attorney's contract expired on June 30, 1972, and after another hiatus its third and present claims attorney entered his appearance on September 21, 1973. 34 Ind. Cl. Comm. 432, 433.

Petitioner moved on July 1, 1974, to amend the First Amended Petition in No. 69 by restating the withdrawn paragraphs of the first six claims. Respondent's response to that motion on July 18 for the first time asked for entry of final judgment dismissing the first six and eighth claims. The Commission granted petitioner's motion to "reformulate" the first six claims in No. 69 and denied respondent's motion for final judgment. Opinion dated January 23, 1975, 35 Ind. Cl. Comm. 305 (Appendix F). That opinion ordered that the consolidated dockets be separated into two separate dockets, the first denominated No. 69 (Claims 1 through 6 and Claim 8), and the second Nos. 69, 299 and 353 (Accounting Claims), which included the seventh claim in No. 69. Respondent's motion to certify the Commission's action to the Court of Claims was denied on July 9, 1975, 36 Ind. Cl. Comm. 215.

Respondent then filed (on June 3, 1976) a motion to dismiss or for more definite statement addressed to the Second Amended Petition in No. 69 (Claims 1 through 6 and Claim 8), which remained undecided when the docket was transferred to the Court of Claims pursuant to P.L. 94-465, 90 Stat. 1990 (1976) [providing for termination of the Commission at September 30, 1978]. The Trial Judge to whom the matter was assigned held in his Opinion of January 23, 1978, that the motion was an untimely motion for rehearing but denied it on the

merits insofar as it challenged the reformulation of Claims 1 through 6. (The first 12 pages of the Trial Judge's Opinion are annexed as Appendix G.)

On review, the Court of Claims on June 13, 1979, rejected the Trial Judge's Opinion and dismissed Claims 1 through 6 and Claim 8 (Appendix A). The Court of Claims held that the contractual requirement for Tribal and Secretarial authorization of adjustments in claims did not apply to the complete withdrawal of claims, and that the unauthorized withdrawal of claims which were never actually dismissed nonetheless created a jurisdictional bar to consideration of those claims on their merits.

Questions raised during a conference with the Trial Judge pertaining to proceedings in Dockets 69, 299 and 353 (Accounting Claims, including Claim 7) led the Trial Judge to advise petitioner to seek clarification of the Court's Opinion of June 13, 1979. Accordingly, petitioner asked the Court (on September 4, 1979) to clarify whether issues presented by the allegations preserved in the seventh claim were affected by the dismissal of the first six claims.[1] By Order of September 28, 1979, the Court held that such dismissal "precluded plaintiff from subsequently reasserting those claims" as issues of the seventh claim.

REASONS FOR GRANTING THE WRIT

The Court of Claims below misconstrued its jurisdiction under the Indian Claims Commission Act, 25 U.S.C. § 70k, by dismissing before trial Claims 1 through 6 of the original Petition and thereafter con-

[1] Claim 8 was not reformulated and is of no relevance in this proceeding.

struing that dismissal as precluding adjudication of issues in Claim 7 that were never dismissed by the petitioner. The Court failed to give effect to explicit safeguards in the Special Claims Contract between petitioner and its attorney prescribed by the Secretary of the Interior under 25 U.S.C. § 81 for the protection of the Tribe. That failure violates the mandate of Section 15 of the Indian Claims Commission Act for protection of tribal interests in the adjudication process. The Court also ignored long-established precedents of this Court and of the Circuit Courts requiring clear authority before an attorney's dismissal of claims against his client's interest can be given effect. Moreover, the Court erroneously construed the intent and effect of the First Amended Petition, guillotining valuable tribal claims before trial when such a result was not intended or approved by petitioner, thus depriving petitioner of due process of law. Finally, the Court reached beyond the matters raised by respondent's motion to dismiss Claims 1 through 6 and Claim 8 and arbitrarily stripped from Claim 7 in a wholly separate docket all issues that may be found within the first six claims. That action not only deprived petitioner of due process of law in the accounting docket but creates such uncertainty that orderly adjudication of its accounting claims may become impossible. Each of these reasons is discussed briefly below.

1. Jurisdiction Misconstrued: Special Claims Contract Ignored: Conflict with Established Precedents.

In Section 15 of the Indian Claims Commission Act, 25 U.S.C. § 70n, Congress allowed each tribe to choose its claims attorney, but it carefully safeguarded the tribe by requiring the Secretary of the Interior to

approve the attorney's contract under 25 U.S.C. § 81. That 1871 statute was "intended to protect the Indians from improvident and unconscionable contracts." *In re Sanborn,* 148 U.S. 222, 227 (1893). As the note (by a member of the Commission's staff) annexed to the Special Claims Contract states (Appendix D), the Secretary rejected the first version of the contract and required certain amendments for the Tribe's protection.

Section 6 of the Special Claims Contract stated:

> "6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY."

The First Amended Petition did not have the required approvals.

The Indian Claims Commission, upon the Tribe's motion to reinstate the claims which its prior attorney had purported to withdraw, found that he lacked authority to withdraw the claims. It is also clear that the United States, in its supervisory capacity over this attorney's contract knew of his lack of authority. The Commission stated, 35 Ind. Cl. Comm. 305, 307, fn. 2 (Appendix F):

> "The attorney contract in effect with the Navajo Tribe at the time of the amended petition of 1969 required that any adjustment of plaintiff's claims by plaintiff's attorneys would be subject to the approval of the tribe. The record does not indicate that this requirement, which would presumably be applicable to an amendment withdrawing several claims, was met."

The Commission, therefore, allowed the Claims to be reinstated in the form of a Second Amended Petition.

The Trial Judge also treated "voluntary withdrawal" of previously pleaded claims as an adjustment of the Tribe's claims requiring approval in accordance with the contract [Appendix G].

However, the Court of Claims construed Section 6 of the Contract

> " . . . as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, *i.e.*, the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, *several of which probably were duplicative of those in other dockets, for what he perceived to be sound tactical or strategic reasons.* That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract 'to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract.' Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action." [App. A; italics added.]

That construction is absurd. There is no basis whatsoever for the Court's italicized speculation that the claims were withdrawn because they were duplicated in other dockets and their withdrawal in No. 69 would achieve some advantage for the petitioner.

The Court's conclusion that the attorney had authority to dismiss the petitioner's multi-million dollar claims ignored long-established precedents of this Court and of the Circuit Courts requiring clear evidence of an attorney's authority to dismiss valuable

claims against his client's interest. In *Holker v. Parker,* 11 U.S. (7 Cranch) 436, 452-453 (1813), Chief Justice Marshall explained:

> " . . . Has the attorney a right to make such a compromise?
>
> "Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, *there can be no hesitation in saying that the compromise, being unauthorized and being therefore in itself void, ought not to bind the injured party.* Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining." [Italics added]

See also *United States v. Beebe,* 180 U.S. 343 (1901); *Thomas v. Colorado Trust Deed Funds, Inc.,* 366 F.2d 136 (10th Cir. 1966).

That fundamental principle must be applied with greater care where an Indian tribe is involved and its attorney's contract expressly denies authority to dismiss claims without double approval. If the attorney's withdrawal of claims was intended as a dismissal of the claims with prejudice, the safeguards of paragraph 6 of the Special Claims Contract were clearly necessary.

For such a broadscale dismissal deprived petitioner of its right to a complete adjudication under the Act of the valuable claims framed in its timely Petition. There was no conceivable "tactical or strategic" reason for such an action; an attorney who would finally abandon such claims would be patently incompetent. Section 6 was required by the Secretary precisely to protect petitioner from such an eventuality.

The Court's recognition that Section 6 required both tribal and secretarial approval for a "termination of claims in return for some consideration given in exchange therefor" is shockingly inconsistent with its conclusion that these valuable claims could be terminated without such approval *because* the Tribe received nothing in exchange. Had the Government paid a peppercorn for termination of these same claims, the attorney's consent would have been void without the required double approval. Cf. *Pueblo of Santa Rosa v. Fall,* 273 U.S. 315, 320 (1927); *Green v. Menominee Tribe,* 233 U.S. 558, 570-571 (1912). Surely, Congress' insistence on basic safeguards of tribal interests in claims litigation demands that the Contract's requirements be met when valuable claims are abandoned without any consideration whatever.

When in 1968 the Court of Claims was confronted with the results of incompetent representation of the Sioux Tribe in a claims case, it took the extraordinary step of vacating its 1956 affirmance of a Commission decision against the Tribe after trial on the merits and remanded to the Commission for reopening of proof. *Sioux Tribe v. U.S.,* 146 F.Supp. 229 (1956), *vacated,* 182 Ct. Cl. 912 (1968). How different was its summary disposition of these valuable Navajo claims, where Section 15 of the Act and Section 6 of petitioner's Special Claims Contract required specific action to prevent manifest injustice to the petitioner through the incompetence of its attorney.

If the Court of Claims was right in viewing the withdrawal as a voluntary dismissal of these claims, the First Amended Petition must be treated as a wholly unauthorized "adjustment" of the claims and of no legal effect.

2. Misinterpretation of Amended Petition.

The First Amended Petition in No. 69 did not in terms state that petitioner was voluntarily dismissing seven of the eight claims in its original Petition. That effect was arbitrarily attributed to the amendment by the Court of Claims; it is inconsistent with its language and with its intention. The Court admitted that the amendment was "not in form, a voluntary dismissal of the plaintiff's nonaccounting claims in Docket No. 69." [Part III of Opinion; App. A.] However, the Court had no reason nor basis in the record to construe the language of the amendment—deleting the specific paragraphs that characterized each "claim" and "withdrawing [those claims] from consideration herein"—as a voluntary dismissal of several causes of action. The Commission had correctly interpreted the amendment according to its plain terms:

> " . . . plaintiff's first amended petition, which purported to withdraw seven of plaintiff's claims, did not delete the allegations of fact which were the substance of those claims. Moreover, plaintiff's seventh claim, which clearly remained after the amended petition of 1969 was filed, stated that plaintiff 'restates and reaffirms each and every allegation of fact' of the original petition." 35 Ind. Cl. Comm. 305, 307 (Appendix F).

The "claims" withdrawn were merely the general allegations of damages in the deleted paragraphs; the causes of action defined by the factual allegations of the other paragraphs and the general prayer for relief were intentionally left unaffected. The amendment was thus intended to be a restructuring of the Petition, not a dismissal of causes of action, in response to respondent's motion of November 14, 1967 that demanded "separately numbered Petitions of the claims pleaded in the original Petition."

Moreover, a reorganization of the original pleading was fully authorized by the Commission's Rules, which did not require separate "petitions" for each "claim." Rule 7(a) stated:

> SEC. 7. *General rules of pleading.*
>
> (a) *Pleading to be concise and direct; consistency.* (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.
>
> (2) *A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.* When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency and regardless of the nature of the grounds on which they are based. All statements shall be made subject to the obligations set forth in Sec. 10(b) [requiring the attorney to believe "good ground" supports the pleading]. [Italics added]

The First Amended Petition, submitted before answer under Rule 13(a)(1) which allowed the restructuring of claims as a matter of course, combined eight separate claims into one.

As long as the factual allegations of the Petition remained, it was incorrect to construe the amendment as a voluntary dismissal of any claims covered by those allegations, by the damages paragraph (¶ 27) of the seventh claim, and by the general prayer for relief in paragraph 30. The Court's arbitrary refusal to consider the plain language of the Petition remaining after the amendment is clear in footnote 3 to the Opinion (App. A):

> The plaintiff challenges characterization of the issue as jurisdictional. It argues that, since it withdrew only the prayers for relief and not the claims themselves, those claims were "subsumed" under the comprehensive prayer for relief of paragraph 30 and under claim 7's incorporation of preceding factual allegations. As noted above, however, the withdrawn paragraphs were not merely prayers for relief, and *claim 7 incorporated only general recitations of fact*. Moreover, the Commission recognized that the claims in question were withdrawn, not subsumed in the surviving claim. *Navajo Tribe v. United States,* 31 Ind. Cl. Comm. 40, 41 (1973). [Italics added.]

The "general recitations of fact" incorporated in Claim 7 comprise the causes of action (*i.e.,* the facts entitling plaintiff to the relief sought in paragraph 30) pleaded by the original timely Petition, and the Com-

mission's 1975 Opinion (quoted above) so held, rejecting its 1973 reference to "withdrawn" claims cited by the Court.

The word "claims" in the First Amended Petition is ambiguous: It is not clear whether it refers merely to the allegations of damages in the deleted paragraphs or, more broadly, to all causes of action presented by the preceding factual allegations. The Court arbitrarily seized upon the broader interpretation, contrary to the long-established rule that Indian tribes must receive the benefit of any doubt on questions of intent or in the interpretation of documents affecting their interests. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 552-558 (1832); *United States v. Kagama,* 118 U.S. 375, 383-384 (1886); *Marlin v. Lewallen,* 276 U.S. 58, 64 (1928); *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942); *McClanahan v. Arizona State Tax Com'n,* 411 U.S. 164, 174-175 (1973); *Menominee Tribe v. United States,* 391 U.S. 404 (1968). In *Santa Rosa Band v. Kings County,* 532 F.2d 655, 660 (9th Cir. 1975), the Court said:

> "This principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretative device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes."

The principle was recognized by the Attorney General in 34 Op. Atty. Gen. 439, 444 (1925):

> "From the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to questions of fact or the construction of treaties and statutes

> relating to their welfare. An illustration of this is found in section 2126 of the Revised Statutes (Act of June 30, 1834, 4 Stat. 733) [25 U.S.C. § 194], which provides:
>
> > 'In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.'
>
> This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians."

That principle was mandated by Section 6 of Special Claims Contract and Congress' establishment of protection for tribal claimants under Section 15 of the Act and 25 U.S.C. § 81. The Court of Claims' arbitrary refusal to apply it amply justifies issuance of the writ.

3. Unwarranted Emasculation of Seventh Claim.

The Order entered on petitioner's Motion for Clarification (and footnote 3 of the Opinion) precludes trial of any "claims" withdrawn in No. 69 unless they were pleaded in Nos. 229, 299, or 353. The unwithdrawn seventh claim in No. 69, which has been consolidated with Nos. 299 and 353 since the Commission's Order of July 25, 1973, is thus stripped of a large portion of its well-pleaded issues. The allegations of the Seventh Claim, which were not deleted by the First Amended Petition, include all of the factual allegations of the first six claims, as the Commission held. Yet the Court

of Claims held that the withdrawal of the first six "claims" jurisdictionally bars their adjudication as surviving elements of the seventh claim. That unsupportable holding is wholly arbitrary and capricious.

The Commission's Rule 7 expressly permitted petitioner to plead multiple claims or counts in a single petition. Under Rule 54(b) of the Federal Rules of Civil Procedure voluntary withdrawal or dismissal of one or more multiple claims has no effect on the remaining claims. *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 431 (1956). The Commission's Rule 7 indicated that those elementary principles of due process were applicable in practice before the Commission, and the Court of Claims was bound thereby.

Furthermore, the Court's ruling that allegations of Claims 1 through 6 which overlap those of Claim 7 are barred from Claim 7 was made in a docket separate from the docket of Claim 7. The Court's ruling was made in "Docket No. 69 (Claims 1 through 6 and Claim 8)" as established by the Commission on January 23, 1975 (App. D, p. 310). The seventh claim was not part of that docket but was separately consolidated by the Commission on July 25, 1973, as "Nos. 69, 299 and 353 (Accounting Claims)." (The Commission's discretion to consolidate or separate claims was confirmed in *United States v. Ft. Sill Apache Tribe,* 209 Ct. Cl. 433, 533 F.2d 531 (1976)). In the Order of September 28, the panel of judges in "Docket No. 69 (Claims 1 through 6 and Claim 8)" ruled, in effect, that its June 13 Opinion would be *res judicata* as to claims or issues pleaded in "Docket Nos. 69, 299 and 353 (Accounting Claims)." Under established practice, the panel in the Accounting Claims docket would decide whether *res*

judicata in fact constituted a defense to claims well-pleaded therein. The September 28 Order apparently deprives that panel of its normal authority.

The Court's Order was thus a clear misapplication of the principles of *res judicata.* Without doubt, *res judicata* is a defense which must be pleaded in the case following the adjudication (here Docket Nos. 69, 299 and 353 (Accounting Claims)), and the Court must determine whether the elements of that defense are in fact present. One of those elements, prior adjudication of a cause of action on the merits, is obviously not present with respect to the withdrawn claims. Therefore, the doctrine of *res judicata* could not be raised as a bar to adjudication of any of the withdrawn claims that had been timely pleaded as elements of the seventh claim. RESTATEMENT OF JUDGMENTS § 48 (1942). There is no other doctrine under which such adjudication would be barred, and the Court's erroneous ruling thus deprived petitioner of due process of law.

Claim 7, embracing all factual allegations incorporated by reference and the prayer for relief in paragraph 30, was timely presented, and none of the elements of that claim is barred by the limitation of § 12 of the Act, 25 U.S.C. § 70k. Since all factual allegations of the first six claims are incorporated in Claim 7, all causes of action based on those allegations were presented timely and remain justiciable. The Commission's discretionary allowance of an amendment of the Petition to "reformulate" those causes of action within the liberal notice requirements of *Snoqualmie Tribe v. United States,* 178 Ct. Cl. 570, 372 F.2d 951 (1967), was clearly proper. The Court of Claims interpretation of "claims" as including all factual predicates of the first six claims is contrary to the terms of the First

Amended Petition, which did not delete or withdraw any factual allegations, and the Court's conclusion is not supported by any other analysis or authority. Therefore, the Court's Order barring adjudication as an element of Claim 7 of any issue constituting a part of the first six claims is wholly arbitrary.

Moreover, the Order creates immense procedural obstacles to the prompt adjudication of Claim 7, which has already been pending for 29 years. Respondent will argue that each triable issue in Claim 7 is barred because it is one of the issues that might have been adjudicated under the first six claims. Already, respondent has taken that position on a score of "accounting" issues, and there are literally hundreds more. The accounting claim will predictably be mired in such sophistry for years to come, again depriving petitioner of its right to full and prompt disposition of its claims under the Act.

CONCLUSION

The writ should issue in this case to uphold Congress' mandate for protection of tribal claimants under the Act, to make effective the provisions of the Special Claims Contract requiring prior approval of any compromise, settlement, or adjustment of petitioner's claims by its attorney, to expunge the Court of Claims' misconstruction of its jurisdiction under the Act and its refusal to follow established precedents of this Court, to construe and apply the pleadings presenting petitioner's claims in accordance with their plain language, the Tribe's obvious intent to obtain prompt adjudication of all claims, and the principle of liberal interpretation for the benefit of the tribe, and to correct the arbitrary dismissal of claims by the Court of Claims. There was manifest injustice below, which the Navajo Tribe asks this Court to review and reverse.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

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APPENDIX

APPENDIX A

In the United States Court of Claims

No. 69

(Decided June 13, 1979)

THE NAVAJO TRIBE OF INDIANS v. THE UNITED STATES

William C. Schaab, attorney of record for plaintiff. *Rodey, Dickason, Sloan, Akin & Robb, Paul D. Barber*, and *Sarah W. Barlow*, of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and SMITH, *Judge*.

OPINION

FRIEDMAN, Chief Judge, delivered the opinion of the court:

This case, byzantine in complexity, has been transferred from the Indian Claims Commission pursuant to Pub. L. No. 94–465, 90 Stat. 1990 (1976), and is now before us on the parties' requests for review of two rulings of Trial Judge C. Murray Bernhardt. In those rulings the trial judge resolved various contentions of the parties regarding the interrelationship of claims pending in various Commission dockets and the status of certain claims in this case.

We find it unnecessary to resolve most of those contentions since we conclude that the plaintiff voluntarily withdrew all of the claims involved in this case after the applicable limitations period had run, and that those claims therefore are time barred. Accordingly, we dismiss claims one through six and claim eight of the petition.[1]

I.

The original petition in this case, filed with the Indian Claims Commission in July 1950, as Docket No. 69, contained eight claims. Each claim consisted of (1) a general recitation of facts, and (2) a paragraph stating the claim arising from those facts. The initial paragraph of claims two through eight incorporated by reference the general recitations of fact stated at the beginning of the preceding claims. Paragraph 30 of the petition contained the prayer for relief.

The first four claims and the sixth claim essentially alleged (1) violation of the government's obligation, pursuant to an 1848 treaty with Mexico and an 1850 treaty with the plaintiff, to protect the plaintiff's property rights; (2) invalidity of an 1868 treaty with the tribe on the grounds of fraud and duress, unconscionable consideration, and unilateral mistake; and (3) failure to provide educational and other services pursuant to the 1868 treaty. The fifth claim alleged that the government, by exploiting and allowing others to exploit the natural resources of the tribe without adequate consideration, violated its fiduciary duty under the 1868 treaty. The seventh claim, a general accounting claim, has been consolidated with the accounting claims in Docket Nos. 299 and 353, and is not before us here. The eighth claim alleged violation of a promise by officers of the United States to return certain lands "to the

[1] This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets. The dismissal of the claims in this case because the plaintiff voluntarily withdrew them would not support the contention that the dismissal is *res judicata* of the merits of those claims.

East" in return for the Navajos' service in the Apache wars.

In August 1951, the plaintiff's claims attorney decided to divide into four separate dockets the eight claims of the original petition. The plaintiff filed a new petition in each of three new dockets, and allowed the petition in this docket (No. 69) to stand, without modification, as the general pleading. The tribe presented a taking claim, based upon facts originally set forth in Docket No. 69, in the petition in Docket No. 229. A claim for mismanagement of resources was presented in Docket No. 353 for oil and gas resources, and in Docket No. 299 for other resources. Thus, many of the claims originally presented in the original docket (No. 69) overlapped with the claims asserted in the subsequent dockets.

Separation of the plaintiff's claims into four dockets did not simplify or abbreviate the litigation of this case. Although almost three decades have passed since the filing of the original petition, the government has yet to file an answer. Instead, in the words of Trial Judge Bernhardt, there has been a "protracted seige of motions." In response to a government request for greater specificity and a Commission order to file an amended petition in Docket No. 69 no later than September 30, 1969, plaintiff filed a First Amended Petition on October 1, 1969. The entire amended petition read as follows:

> The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25, and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth, and eighth claims.

The government, on July 18, 1974, sought entry of final judgment in its favor on those claims. The Commission, on January 23, 1975, granted a motion by the plaintiff to amend its petition in Docket No. 69 by "reformulating" the first six claims. *Navajo Tribe* v. *United States*, 35 Ind. Cl. Comm. 305, 315 (1975). The Commission denied a motion for certification of that ruling to this court. *Navajo Tribe* v. *United States*, 36 Ind. Cl. Comm. 215 (1975).

On June 3, 1976, the government filed a motion to dismiss or for a more definite statement. The Commission transferred the case in Docket No. 69 to this court without ruling on the motion. On January 23, 1978, Trial Judge Bernhardt ruled on the motion, and on May 2, 1978, he issued an order on the tribe's motion for reconsideration of his January 23 ruling. With respect to the Commission's reinstatement of the dismissed claims after the limitations period had run, the trial judge denied the government's motion to dismiss the reinstated claims on the ground that those claims related back to the original petition.

II.

The applicable statute of limitations in the Indian Claims Commission Act, 25 U.S.C. § 70k, is a jurisdictional limitation upon the authority of the Commission to consider claims. *United States* v. *Lower Sioux Indian Community*, 207 Ct. Cl. 492, 501, 519 F.2d 1378, 1382 (1975); *Snoqualmie Tribe* v. *United States*, 178 Ct. Cl. 570, 586, 372 F.2d 951, 960 (1967). The provision, which defines the extent of the government's waiver of sovereign immunity, bars any claim not "presented" to the Commission on or before August 13, 1951. In this case, the original petition in Docket No. 69 was timely filed in July 1950, but the claims in question were withdrawn in 1969. The second amended petition, in effect reasserting the withdrawn claims, was not filed until 1975.

The Commission allowed the plaintiff to reinstate the withdrawn claims in 1975 on the ground that the "reformulated" claims were based upon and related back to the general recitations of fact in the original petition which were not withdrawn. 35 Ind. Cl. Comm. at 307. Although the 1969 amended petition "deleted" only the specific paragraphs which stated the claims in some detail, and not the general factual allegations preceding those paragraphs upon which the claims were based, the deleted paragraphs were the actual statements of the claims. Indeed, the plaintiff recognized in its 1969 amendment that by deleting

those paragraphs it was "*thereby withdrawing from consideration* herein the first, second, third, fourth, fifth, sixth, and eighth *claims*" (emphasis added).

The decision whether to dismiss all or part of a case lies with the plaintiff (subject to any necessary authorizations by the tribunal). In this case, for reasons not fully explained in the record, the tribe's claims counsel chose to withdraw the claims in question. Perhaps the attorney was unable to comply with the Commission's order for greater specificity, or sought to make the case more manageable by simplifying the claims and eliminating or reducing duplication.

Whatever his reasons, whether wise or ill-founded, the decision to withdraw these particular claims was a tactical decision similar to those attorneys constantly must make in the conduct of litigation. The plaintiff is bound by the actions of its attorney.

The plaintiff contends, however, that its attorney had no authority to withdraw those claims. It relies upon paragraph 6 of the contract between it and the attorney, which provided:

> 6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY [OF THE INTERIOR].[2]

The Commission presumed that the word "adjustment" covered the withdrawal of the claims, and noted that the record did not indicate whether the tribe had approved the withdrawal. 35 Ind. Cl. Comm. at 307, n. 2.

We construe this provision as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, *i.e.*, the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, several of which probably were duplicative of those in other dockets, for what he perceived

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[2] Although the contract refers to Docket No. 89 before the Commission, we assume that was a typographical error, and the reference should have been to Docket No. 69. There is no Docket No. 89 in this case.

to be sound tactical or strategic reasons. That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract "to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract." Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action.

Trial Judge Bernhardt upheld the Commission's reinstatement of the withdrawn claims on the ground that the second amended petition met the liberal notice requirement applied in determining whether an amended petition filed with the Commission after the limitations period related back to the original timely petition. The trial judge relied on *United States* v. *Lower Sioux Indian Community in Minn.*, 207 Ct. Cl. 492, 519 F.2d 1378 (1975), *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 393 F.2d 786 (1968), and *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 372 F.2d 951 (1967). Those decisions dealt with the question whether allegations in a timely petition were sufficient to cover the claims asserted in an otherwise untimely amendment. In the *Snoqualmie* case, we held that the requirement of the statute of limitations, that claims be "presented" within the limitations period, "should be read liberally to permit an amended pleading to relate back where there is sufficient notice." 178 Ct. Cl. at 588, 372 F.2d at 961.

That principle, however, has no application in a case in which the plaintiff has withdrawn its original claims and then seeks to reinstate them after the limitations period has run. The question here is not, as in those cases, the construction of the original petition; the issue before us is the effect of the plaintiff's voluntary dismissal of its claims in 1969.

III.

The first amended petition was in effect, if not in form, a voluntary dismissal of the plaintiff's nonaccounting claims

in Docket No. 69. The amendment was filed pursuant to an order of the Commission, and no further authorization or action of the Commission was required. The Supreme Court stated the applicable rule in *Willard* v. *Wood:* "[W]here *from any cause* a plaintiff becomes nonsuit or the action abates or *is dismissed*, and, during the pendency of the action the limitation runs, the remedy is barred." 164 U.S. 502, 523 (1896) (emphasis added). In this case, the claims were dismissed because the plaintiff chose to do so. Following the dismissal, the situation stood as if the withdrawn claims had never been filed. *A. B. Dick Co.* v. *Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878, *rehearing denied*, 344 U.S. 905 (1952); *Maryland Cas. Co.* v. *Luther*, 41 F.2d 312 (5th Cir. 1930). For purposes of the statute of limitations, the claims contained in the second amended petition were "presented" for the first time in 1975, and the Commission lacked jurisdiction to hear them.[3]

IV.

Before concluding this opinion, we advert to a problem that exists in this case and probably in a number of other cases that the Indian Claims Commission recently has transferred to this court. That is the subject of delay. All of these cases were pending before the Commission for more than a quarter of a century, and some of them still are a long way from completion. The cases of which this docket is one part involve a wide variety of claims by the Navajo Tribe. The government has not yet filed its answer in some or all of the dockets. Unless drastic and effective steps are taken to expedite the proceedings in these Indian Claims Commission cases, they threaten to drag on indefinitely.

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[3] The plaintiff challenges characterization of the issue as jurisdictional. It argues that, since it withdrew only the prayers for relief and not the claims themselves, those claims were "subsumed" under the comprehensive prayer for relief of paragraph 30 and under claim 7's incorporation of preceding factual allegations. As noted above, however, the withdrawn paragraphs were not merely prayers for relief, and claim 7 incorporated only general recitations of fact. Moreover, the Commission recognized that the claims in question were withdrawn, not subsumed in the surviving claim. *Navajo Tribe* v. *United States*, 31 Ind. Cl. Comm. 40, 41 (1973).

The trial judges have an obligation to expedite these cases, and to take all necessary steps to insure their speedy determination. Many of the cases are complicated and difficult. There is a need for innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years. We have faith in the ability of the trial judges to develop such techniques. We expect the cases to be completed within a reasonable time.

More specifically, we direct the trial judge in the Navajo cases to file within 90 days, and after consultation with counsel, a timetable setting forth firm time limits for the proceedings in Docket Nos. 229, 299, and 353. These time limits should cover the filing of any further pleadings and amendments thereto, the filing of all dispositive or procedural motions, the completion of pretrial proceedings, and the trial of the cases. We expect the other trial judges to adopt similar timetables in cases transferred from the Commission.

CONCLUSION

Claims 1 through 6 and claim 8 in Docket No. 69 are dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 69

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge,* COWEN, *Senior Judge,* and SMITH, *Judge.*

Order

The plaintiff has filed a motion for clarification of our opinion of June 13, 1979, in which we dismissed claims 1 through 6 and claim 8. In so doing, we stated that "This dismissal is without prejudice to the plaintiff's assertion of any of these claims in other dockets involving the plaintiff if those claims in fact are present in those dockets." (Footnote 1). Plaintiff now asserts that in this footnote we contemplated the possibility that the dismissed claims still might be asserted as part of claim 7 in docket No. 69, a general accounting claim that has been consolidated with the accounting claims in docket Nos. 299 and 253, and which therefore was not before us.

Plaintiff is mistaken. Footnote 1 was intended to make clear that despite the dismissal of claims 1 through 6 and claim 8, those claims could be asserted in the other pending dockets (Nos. 229, 299 and 353) if in fact they "are present in those dockets." The determination whether the dismissed claims are so present is a matter for the trial judge. Obviously, we would not have dismissed claims 1 through 6 and claim 8 in docket No. 69 if we had contemplated that all of those claims could be fully pressed under claim 7 in that docket. To the contrary, we held that plaintiff's previous

withdrawal of claims 1 through 6 and claim 8 in docket No. 69 precluded plaintiff from subsequently reasserting those claims because at the time of reassertion the statute of limitations had run on them. The plaintiff may pursue these dismissed claims only if and to the extent they are also part of the claims asserted in the dockets other than docket No. 69.

BY THE COURT

/s/ DANIEL M. FRIEDMAN
Daniel M. Friedman
Chief Judge

September 28, 1979

Filed: 7-11-50

APPENDIX C

BEFORE THE INDIAN CLAIMS COMMISSION

No. 69

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES OF AMERICA

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INDEX TO CLAIMS*

First Claim: Navajo lands; Treaty of September 24, 1850 1

Second Claim: Navajo lands; Treaty of August 12, 1868: Alternative Claims 7

Third Claim: Agricultural lands; Damage to reservation lands; Treaty of August 12, 1868 10

Fourth Claim: Education; schools 14

Fifth Claim: Natural resources and tribal property 18

Sixth Claim: Miscellaneous facilities; Treaty of August 12, 1868 20

Seventh Claim: Tribal funds; fiduciary relationship 21

Eighth Claim: Agreement for service in Apache wars 23

Appendix A: Treaty of September 24, 1850 25

Appendix B: Treaty of August 12, 1868 29

* This index is submitted for convenience only and is not a part of the petition. The titles in the index, which also appear in parentheses at the commencement of each claim, cannot by reason of their brevity wholly or adequately represent the subject matter and are not to be construed as a part of the allegations for any purposes.

BEFORE THE INDIAN CLAIMS COMMISSION

No. .....

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES OF AMERICA

PETITION

To the Honorable Commissioners of the Indian Claims Commission:

Your petitioner, the Navajo Tribe of Indians, respectfully represents and alleges as follows:

First Claim

(Navajo lands; Treaty of September 24, 1850)

1.

Petitioner is a tribal organization recognized by the Secretary of the Interior as having authority to represent the Navajo tribe, and authorized by Section 10 of the Act of Congress approved August 13, 1946, Public Law 726, 79th Congress, 2d Session (60 Stat. 1049), an act to create and establish an Indian Claims Commission, to present claims to the said Commission for and on behalf of the petitioner and its members, who live upon and about their reservation in the States of New Mexico, Arizona, Utah and Colorado under the jurisdiction of the United States as exercised by and through the United States Department of the Interior.

2.

The claims herein set forth are presented pursuant to the aforesaid Indian Claims Commission Act; jurisdiction to hear and determine the said claims, and each of them, is conferred on the Commission by Section 2 of the said Act.

3.

None of the claims herein set forth has been the subject of any action taken by Congress or by any department of the government or in any judicial proceeding; none is included, in whole or in part, in any suit pending in the Court of Claims or in the Supreme Court of the United States, and none has been filed in the Court of Claims under any legislation whatsoever.

4.

Pursuant to a contract executed July 17, 1947, and approved by the Commissioner of Indian Affairs on behalf of himself and the Secretary of the Interior on August 8, 1947, petitioner retained Norman M. Littell as general counsel and claims attorney, together with associate attorneys S. King Funkhouser and, by amendment duly executed and approved, Rufus G. King, Jr. The claims herein set forth are accordingly presented by petitioner's attorneys, Norman M. Littell, S. King Funkhouser and Rufus G. King, Jr.

5.

For centuries prior to the year 1864 petitioner and the various tribes and bands amalgamated with it during this period had occupied a section of the North American continent, now part of the southwestern United States, which was approximately bounded southward and eastward by four mountains, traditionally sacred to the Navajos and presently known as Mount Taylor in New Mexico, the San Francisco Peaks in Arizona, the La Plata Mountains in Colorado, and Mount Baldy in Colorado, and to the north and west by the Dolores and Colorado rivers. Most of this area, comprising approximately 45,000 square miles, was rich and fertile, a homeland where petitioner enjoyed all the rights of a free and sovereign people, governing itself, enjoying the fruits of industry and husbandry at a comparatively high level of aboriginal civilization, and armed in the fashion of the times to defend itself and repel aggressors.

6.

Attempts were made to subjugate petitioner by representatives of the Spanish Crown in the seventeenth and eighteenth centuries, and by representatives of the Mexican Government after 1823, but petitioner's right, title, and interest in and to petitioner's lands were fully protected and preserved pursuant to Spanish and Mexican law. In 1846 the government of Mexico renounced its sovereignty over this area in favor of the respondent, and thereafter respondent's agents and citizens invaded petitioner's homeland in ever-increasing numbers, until a state of open hostility gradually developed. Before mounting pressure, petitioner withdrew to the wilder areas now identified as the vicinity of Navajo Mountain, the Canyon de Chelly, and the headwaters of the San Juan River. Military expeditions were sent into these areas to attack petitioner; retaliatory raids against the invader were organized and vigorously carried out. After two centuries of generally peaceful contiguity with white men, during which petitioner's members had acquired sheep and had gradually shifted from pueblo life to a pastoral culture, the Navajo took to arms and emerged as an important center of resistance in the path of the white man, as represented by respondent's agents and citizens.

7.

Petitioner was at all times ready to make an honorable reconciliation in so far as its members were apprised of and understood the white man's ways. A treaty of peace was negotiated and concluded between petitioner and respondent's agents in November, 1846, but was not ratified by respondent's Senate, or thereafter respected by respondent. A second treaty was negotiated and concluded between petitioner and respondent's agents on September 9, 1849, which said second treaty was ratified by respondent's Senate on September 9, 1850, and proclaimed by President Millard Fillmore on September 24, 1850 (9 Stat. 974). A true copy of said Treaty of 1850 is attached hereto and made a part hereof as "Appendix A." Article I thereof provides that petitioner shall be under the jurisdiction and protection of the United States pursuant to

the terms of the Treaty of Guadalupe Hidalgo. Article II of said Treaty of 1850 pledges "perpetual peace and friendship." Article III provides that the laws of the territory of New Mexico shall be applied and enforced in petitioner's country, and that the same shall be annexed to and made a part of the said territory, and Article VI provides that any person murdering or robbing petitioner's members shall be made answerable under laws of the United States. Article VIII provides that respondent shall establish military and trading posts in petitioner's country. Article IX provides:

> "Relying confidently upon the justice and the liberality of the aforesaid government (respondent), and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians."

8.

Petitioner was assured by a protocol between the Mexican and the American governments and by the terms of the Treaty of Guadalupe Hidalgo, proclaimed by President Polk on July 4, 1848, that titles to all kinds of property, personal and real, existing in the ceded territories, were those which were legitimate titles under Mexican law, and that petitioner would be protected in the free enjoyment of its liberty and property by the respondent. Under Spanish law, prior to the attainment of Mexican independence in 1824, the rights of Indians to the possession and the full amount of lands belonging to them was fully protected, and those who sought to seize Indian lands or despoil Indian property were severely punished. After Mexico became independent of Spain in 1824, the rights of Indians were confirmed, enlarged, and strengthened and they were given equality of rights with other citizens and their ownership of property was fully protected. By the aforesaid Treaty of Guadalupe Hidalgo, the respondent agreed to protect and maintain the petitioner and its members in the full enjoyment of their liberty and property. By the aforesaid Treaty of 1850, respondent assumed exclusive jurisdiction and protection of the petitioner and petitioner's property rights, but respondent made no effort to abide by, carry out, or enforce the aforesaid Treaty of 1850. On the contrary, petitioner was induced to negotiate and conclude two subsequent treaties with respondent's agents, one in 1855 and one in 1857, neither of which was ratified by respondent's Senate, or thereafter respected by respondent. The inconsistency, unreliability, and faithlessness of respondent's agents, and the series of negotiations conducted by them in this period, caused the Navajo rightfully to discredit and mistrust treaty terms.

9.

Respondent negligently and willfully departed from the standards of fair and honorable dealings in its relations with petitioner during the entire period from 1846 to 1868, in all said relations and, without limitation, in confusing and deceiving petitioner by negotiating various and inconsistent agreements and treaties and by permitting divers persons to harass petitioner and drive petitioner from rich and valuable portions of its homelands, as more particularly described in paragraph 5 above. Respondent failed, neglected, and refused to abide by, and committed numerous breaches and violations of, the terms of the aforesaid Treaty of 1850, although said treaty had been duly ratified by the Senate and proclaimed by the President of the United States.

10.

WHEREFORE, as its first claim, petitioner alleges:

(a) Respondent failed to accord to petitioner the right, title, interest, benefits, and enjoyment of property conferred on Indians by Spanish and Mexican law, pursuant to the Treaty of Guadalupe Hidalgo, as provided by the aforesaid Treaty of 1850.

(b) Respondent failed to apply or enforce the laws of the territory of New Mexico in petitioner's country, failed to annex petitioner's country to the territory of New Mexico,

and failed to apply and enforce the laws of the United States therein, and, on the contrary, respondent maintained military law until 1873 and intermittently thereafter, thereby subjecting petitioner's members to great suffering and hardship and depriving them of the fruits and benefits to which they would otherwise have been entitled as citizens of the territory of New Mexico, both prior to and after the accession of that territory to statehood in 1912.

(c) Respondent failed to protect petitioner's members against being murdered and robbed, as specifically undertaken in Article VI of the aforesaid Treaty of 1850, and, on the contrary, respondent's agents tolerated, acquiesced in, and sometimes led raids and expeditions into petitioner's country for the purpose of murdering and robbing petitioner's members, said raids and expeditions being conducted both by respondent's armed forces and by unauthorized bands of territorial troops, adventurers, Mexicans, and hostile Indians.

(d) Respondent failed to establish or maintain military or trading posts in petitioner's country, as specifically undertaken in Article VIII of the aforesaid Treaty of 1850, thereby depriving petitioner of the protection, order, and civilizing contacts which would have been afforded thereby, and aggravating the grievous situation and events hereinafter set forth.

(e) Respondent failed to designate, settle, and adjust petitioner's territorial boundaries, as specifically undertaken in Article IX of the aforesaid Treaty of 1850, in violation of the terms of said treaty and of the Treaty of Guadalupe Hidalgo, and thereby caused petitioner to be driven from and deprived of its homelands to the great loss and damage of the petitioner in that petitioner thereby lost approximately 20,000 square miles of rich land which was rightfully the property of petitioner, and petitioner's people were therefore confined to barren and unproductive lands where they have ever since eked out a bare existence, all as more particularly set forth hereinafter.

Second Claim

(Navajo lands; Treaty of August 12, 1868: Alternative Claims)

11.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, and further respectfully represents and alleges as follows:

In addition to those duties which respondent owed to the petitioner and its members pursuant to treaty obligations, respondent owed the duties of a guardian towards its wards, but as a result of respondent's failures, neglect, and breaches of its said duties toward petitioner and its members, arson, murder, and pillage continued to be perpetrated against them, and in retaliation by them, until, in 1863, full-scale warfare was initiated by respondent's agents. In the spring of 1864, after their crops had been ravaged and their dwellings fired, petitioner's members were overwhelmed by armed forces of the respondent. Many Navajos were killed, and the balance were compelled to surrender. Thereafter, together with their women and children and aged and infirm, they were mercilessly herded and driven on foot in a southeasterly direction a distance of 300 miles from their homeland to Fort Sumner, New Mexico, where those who had survived this full-scale war and the "Long March" were imprisoned under military guard.

12.

For a period of four years thereafter petitioner's members were held by armed forces of the respondent in a state of imprisonment and involuntary servitude at Fort Sumner, crowded into a small area, inadequately clothed, badly housed and fed, ravaged by disease, and reduced by close confinement and complete disruption of all their normal and historic ways of living to a destitute and desperate condition.

13.

Such was the condition of the imprisoned remnants of the petitioner's people in the spring of 1868 when a treaty was submitted by the respondent to the head men of the Navajos.

On June 1 the treaty was signed. None of the signers on behalf of the petitioner was literate. No legal counsel was appointed to advise the petitioner's head men, and no legal or other disinterested advice was available to them. Only the advice and assistance of the respondent's agents and employees and the interpretation of language by respondent's interpreters were available to petitioner. All of the signatures affixed by and on behalf of petitioner were by mark only. Thus the Treaty of 1868 was signed.

14.

The said treaty was submitted to and ratified by the Senate of the United States on July 25, 1868 (15 Stat. 667), and proclaimed by President Johnson on August 12, 1868. Annexed hereto and made a part hereof as "Appendix B" is a true copy of said Treaty of 1868.

15.

Article II of the aforesaid Treaty of August 12, 1868 (Appendix B), defined and limited the boundaries of the Navajo reservation as follows:

> "The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; . . ."

The said territory thus defined in the Treaty of 1868 was a meager and barren portion of petitioner's homeland and of the rich and fertile area upon which petitioner and its members had theretofore subsisted.

From time to time, through divers laws and executive orders, additional areas of land were transferred from the public domain to the Navajos as additions to the aforesaid reservation described in the Treaty of 1868, but such additions were frequently reduced, rescinded, or cancelled under pressure from non-Indian settlers who desired said lands for themselves. At no time has petitioner renounced its right, title, and interest in and to the lands described in paragraph 5 above, and at no time have the additions or attempted additions to the said reservation by the respondent been sufficient in area to restore to the petitioner the aforesaid original homelands.

16.

WHEREFORE, as its second claim, petitioner alleges in the alternative as follows:

First Alternative

(a) That the said Treaty of 1868 and each and every provision thereof is invalid and void on the grounds of fraud, duress, unconscionable consideration and unilateral mistake; that the lands described in paragraph 5 above were wrongfully seized and taken from petitioner by said fraud and duress.

(b) Respondent at all times material herein failed and refused to restore to the petitioner the aforesaid lands wrongfully seized by others by and with the consent and wrongful approval of the respondent, thereby depriving petitioner of approximately 20,000 square miles of land as described in paragraph 5 above, and respondent at all times material herein failed and refused to pay just compensation to the petitioner for the said lands, and in consequence there is due and owing to petitioner a sum which can only be determined after this Commission first finds and determines the boundary lines and fair value of the area thus wrongfully taken.

Second Alternative

The said Treaty of 1868 between the petitioner and the respondent should be deemed to be revised in each and every

respect set forth hereinafter in the allegations of this and succeeding paragraphs of this petition on the grounds of fraud, duress and unconscionable consideration, mutual or mistake in law and in fact, and particularly said treaty should unilateral mistake in law and in fact, and particularly said treaty should be deemed to be revised to include as reservation lands all of that area designated in paragraph 5 above to which petitioner was rightfully entitled pursuant to the Treaty of Guadalupe Hidalgo, the aforesaid Treaty of 1850, and by right of aboriginal occupancy. In so far as the said treaty sought to bind petitioner to accept the aforesaid reservation boundaries as the limits of its tribal land, it was not accepted and approved by petitioner's head men as their free and voluntary acts but was accepted only under threat, duress, and in the presence of force. At all times since the execution of said treaty, the petitioner's members have been wrongfully excluded and barred from, and prevented from returning to, and have been uncompensated for the loss of, their true and rightful possession of the homeland of the Navajos.

Third Claim

(Damage to reservation lands; Treaty of August 12, 1868)

17.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9 and 11 through 15, and further respectfully represents and alleges as follows:

Petitioner's members were at all times material herein uneducated and uninformed in regard to the white man's ways and, until the summer of 1947, were without legal counsel to advise petitioner in respect to petitioner's legal rights. Petitioner and petitioner's members have at all times been diligent and faithful in complying with the terms of the Treaty of 1868 and in carrying out each and every obligation required of petitioner and petitioner's members without knowledge of the true legal status of the said treaty as hereinabove alleged.

Should the Commission find pursuant to the first alternative of the second claim (paragraph 16 above) that the said Treaty

of 1868 is invalid on the grounds of duress, fraud, and mistake, as hereinabove alleged, then and in that event the ordinary standards of fair and honorable dealing between the petitioner and the respondent, and the duties and obligations of the respondent as guardian of petitioner and of petitioner's members, demanded that the respondent take all steps necessary in order to civilize, educate, and establish the petitioner's members in agricultural and other pursuits to the end that they should become self-supporting, independent citizens, and responsible members of peaceable communities, and petitioner alleges that the minimum of such obligations of the respondent, subject to qualifications and exceptions hereinafter stated, were indicated in the so-called Treaty of 1868, and that said treaty be considered as specifying in part the duties owing by the respondent to its wards. Standards of fair and honorable dealing, and the duties of respondent as guardian, required respondent to exercise the highest degree of care in all acts and services in carrying out its said obligations and especially in dealing with petitioner's property and funds. In the event of such finding by the Commission, holding invalid the said Treaty of 1868, then the allegations hereinafter stated in the following paragraphs of this petition, in so far as they refer to breaches and violations of the said Treaty of 1868 by the respondent, are submitted as setting forth the failures, breaches, and violations of said minimum of undertakings, promises, and commitments by the respondent, as departures from the standards of fair and honorable dealings in respondent's relations to the petitioner, and as failures of respondent in the performance of its duties as guardian for the petitioner and petitioner's members.

Should the Commission sustain the second alternative of the second claim and find that the said treaty is valid but that claims should be allowed which would result if said treaty were revised on the grounds of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or in fact, or on any other grounds cognizable in a court of equity, then and in that event the allegations hereinafter set

forth in this petition are submitted as setting forth such claims together with respondent's breaches and violations of the said treaty, as departures from standards of fair and honorable dealings in respondent's relations to petitioner, and as failures of respondent in the performance of its duties as guardian for the petitioner and petitioner's members.

18.

Petitioner and petitioner's members have at all times been diligent and faithful in trying to comply with the terms of said Treaty of 1868 to the best of their understanding and abilities, but respondent has failed and refused to carry out its obligations thereunder.

The said Treaty of 1868 (Appendix B) provides in part:

> "ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation . . .
>
> "ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars."

Instead of complying with the provisions of the treaty and endeavoring to assist and aid the petitioner and its members in settling upon agricultural land, the surviving members of petitioner's tribe were taken, again on foot, after the said treaty was executed, some to Fort Wingate near Gallup, New Mexico, and the rest to Fort Defiance, Arizona, where they were held under conditions of severe hardship through the winter of 1868-69 and through most of the year 1869. White men had in the period of petitioner's captivity entered upon and seized most of the rich lands theretofore owned and occupied by Navajos, except for the inadequate and relatively barren area designated as their reservation.

Thereafter petitioner's members were released upon this reservation. With the exception of a limited number of families, particularly along the San Juan River, settlement in farming pursuits was then, and at all times since has been, impossible, all of which was known to respondent at the time when said treaty was signed, but was not known to petitioner. Various seeds and basic agricultural implements in an amount and of a value unknown to your petitioner, were distributed indiscriminately among petitioner's members, but it was not possible for them to take full advantage of the terms of said treaty provision because the purported right of settlement on specific lands for agricultural pursuits constituted a deception and delusion inasmuch as the lands assigned within the aforesaid reservation, with the exception of a limited area, were then, and at all times since then have been, too arid and barren for farming purposes. Respondent failed and neglected to advise petitioner's members as to the import and operation of the provisions of Article VII of the said treaty, and although lands suitable for farming were available to respondent throughout petitioner's former homeland, and could and should have been supplied to petitioner, respondent at all times failed and refused to supply such lands, compelled petitioner's members to subsist on herding sheep as aforesaid, and encouraged the Navajos to build up their flocks to a point where each family would have at least a thousand head of sheep.

As a direct result of said policies and practices of the respondent, by the year 1937 the said reservation was overcrowded, eroded, and irreparably damaged by overgrazing, and petitioner had been led by the respondent down a blind avenue affording no possibility for the petitioner's people to become self-sufficient in a productive economy. Respondent's failure to supply agricultural land, as promised in the Treaty of 1868, to relieve the grazing areas, and respondent's encouragement of grazing as almost the exclusive economy of the Navajos thus brought the petitioner to a state of poverty and destitution

so that public charity has been necessary over a period of years to alleviate hardship and suffering.

19.

WHEREFORE, as a third claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent at all times failed to provide agricultural land for the heads of Navajo families, although said lands were at all times available to the respondent for distribution in accordance with the terms of the aforesaid treaty.

(b) The reservation lands to which petitioner was confined were damaged and injured by overgrazing to an irreparable extent in many areas, and in other areas in such a manner and to such an extent that only years of work and a very great expenditure of funds beyond the means of the petitioner could restore said lands and bring them back to their normal and proper grazing capacity, all to the petitioner's great loss and damage.

Fourth Claim

(Education; schools)

20.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, and 17 and 18, and further respectfully represents and alleges as follows:

Article I of the aforesaid Treaty of 1868 (Appendix B) provides in part, "From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it . . ." Article V provides that heads of Navajo families may settle on 160 acres of

selected lands, and single members of the tribe may settle on 80 acres of such lands. Article VI provides as follows:

> "In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.
>
> "The provisions of this article to continue for not less than ten years."

On its part, the petitioner relinquished the most fundamental right of a free people—the right to protect and defend itself—and in return it received respondent's pledge of peace, education, and assistance in adapting itself to the ways of the white men. In forcing petitioner's members to abandon their own way of life, respondent solemnly pledged its honor to teach them the ways of American civilization and to provide education so that they could espouse the only way of life left open to them, namely, active participation in the new society being built around them.

Various efforts have been made by respondent from time to time, and various sums of money have been authorized and expended, to fulfill its obligations in educating petitioner's members and preparing them to take a fitting place in the culture and society of respondent, but such efforts have been patently insufficient, ineffectual, and piecemeal, and at no time have they been realistically related to the size of the Navajo population. Respondent's expenditures have been inadequate, wasteful, ill-advised, and poorly administered, and have not fulfilled the pledges made by respondent in the said Treaty of 1868. Respondent at all times failed to supply the means

of civilizing the Navajos; at the outset, in lieu of the schoolhouse and teacher promised for every 30 children, only one schoolroom and the intermittent services of one teacher were provided for the entire tribe. Seventy-eight years thereafter, when the aforesaid Indian Claims Commission Act was enacted, petitioner's members, numbering approximately 61,000, were still living in an impoverished and exhausted land, in squalor and abject poverty, without training in health practices, citizenship, or ways of economic development, afflicted with the highest tuberculosis and infant mortality rates in the United States, as well as high incidence of diarrhea, dysentery, pneumonia, dental caries, trachoma, skin and venereal diseases. After years of neglect and disregard of its treaty obligations by respondent, petitioner's members constitute a submerged, isolated, and broken people, of whom approximately 88 per cent are illiterate and unable to speak the English language, 66 per cent have no schooling whatever, while the median number of school years for the tribe is less than one year, and no school facilities whatever exist for 16,000 out of 21,000 children of school age. Adequate schoolhouses have never been provided. Teachers have never been engaged in sufficient numbers. Respondent's agents and employees have made no consistent efforts to induce or enable petitioner's members to send their children to such inadequate schooling facilities as were, in fact, made available, and such facilities have from time to time been neglected, allowed to deteriorate and become unfit for use, and closed or abandoned. Moreover, respondent, in its superior experience and with the wide knowledge available to it, at all times knew that the facilities provided would be and have been ineffectual to achieve the end, viz., to give "the elementary branches of an English education," contemplated and intended by the parties—taking into account the wide dispersion of petitioner's community. Petitioner could not induce its children to attend the schools when there were no schools to attend, or when the schools were too few and too remote from where petitioner's members lived.

As a direct and proximate result of the said violations of treaty obligations and of respondent's bungling, neglect, and default, the great majority of petitioner's members live in a state of suffering and uncomprehending bewilderment, without self-reliance, set apart from, and powerless to participate on equal terms with, their fellow countrymen in the agricultural and industrial life of the nation to which they contributed so much in times of peace and in times of war.

21.

WHEREFORE, as a fourth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent has by said conduct failed and neglected to insure the civilization of petitioner and to maintain an honorable peace, in violation of the intent, spirit, and purpose of the said Treaty of 1868, and in disregard of the express pledges, promises, and affirmations made therein, and has thereby caused and brought about the downfall of the petitioner from independence, health, and self-sufficiency, to the grievous conditions and the abject circumstances related in paragraph 20 above.

(b) Respondent has continuously failed and neglected to serve and discharge the terms of the said Articles I, V, and VI of said Treaty of 1868, and each and every part thereof. Respondent has thus continuously defaulted, at all times material herein, in its obligation to provide school facilities and teachers, the same being a continuous obligation, from the date of the said Treaty of 1868 to the enactment of the aforementioned Indian Claims Commission Act, the said default constituting a breach of the Treaty of 1868 and operating to petitioner's great loss and damage.

Fifth Claim

(Natural resources and tribal property)

22.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, and 20, and further respectfully represents and alleges as follows:

Respondent has at all times since the captivity of petitioner exercised complete dominion and control over petitioner's tribal property, and has held and does now hold title to the reservation lands in a fiduciary capacity for the use and benefit of petitioner. Article II of the aforesaid Treaty of 1868 (Appendix B) provides that the reservation of the Navajos was originally "set apart for the use and occupation of the Navajo tribe of Indians," and also:

> ". . . that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

Notwithstanding the foregoing restrictions, respondent has tolerated and allowed many persons in and upon the reservation and areas subsequently added thereto for various unauthorized purposes in derogation of petitioner's exclusive right of occupancy and exclusive enjoyment of all natural resources and earnings and benefits therefrom. Such unauthorized persons have profited on resources of the reservation and have exploited petitioner's members, pre-empted land rightfully set apart for use and occupation of petitioner's members, and drawn many millions of dollars out of the weak economy of the tribe, without payment of adequate compensation therefor, all to petitioner's great prejudice and damage.

23.

WHEREFORE, as a fifth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms

thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects (enumerated without limitation):

(a) Respondent has tolerated and allowed certain persons to remove oil and gas from lands set apart for the use of petitioner and its members, and has sold such oil and gas to divers persons for an inadequate consideration at less than the true market value of said oil and gas, all to petitioner's great loss and damage.

(b) Respondent has mined coal for its own use, and tolerated and allowed certain persons to mine and remove coal from lands set apart for the use of petitioner and its members, and to buy such coal for an inadequate consideration, all to petitioner's great loss and damage.

(c) Respondent has removed timber for its own use, and tolerated and allowed certain persons to remove timber from lands set apart for the use of petitioner and its members, and to buy such timber for an inadequate consideration at less than the true market value thereof, all to petitioner's great loss and damage.

(d) Respondent has mined and removed vanadium ore for its own use and tolerated and allowed certain persons to mine and remove vanadium ore, containing valuable uranium and other minerals, from lands set apart for the use of petitioner and its members, and to buy such vanadium ore for an inadequate consideration at less than the market value thereof, all to petitioner's great loss and damage.

(e) Respondent has allowed and permitted certain persons to enter upon and transact business of various sorts on petitioner's reservation without payment of compensation to petitioner, and has permitted certain persons to graze livestock upon said lands, all to petitioner's great loss and damage.

(f) Respondent has granted and conveyed and allowed to be granted and conveyed divers rights of way on and over

petitioner's reservation lands without adequate compensation and without compliance with the terms of the Treaty of 1868, without payment of adequate compensation therefor, all to petitioner's great loss and damage.

Sixth Claim

(Miscellaneous facilities; Treaty of Aug. 12, 1868)

24.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, and 22, and further respectfully represents and alleges as follows:

By Article III of the said Treaty of 1868 (Appendix B) the respondent undertook and bound itself to cause to be built one warehouse, one carpenter shop, one blacksmith shop, one schoolhouse, and one chapel (besides a residence for one agent). The said Article III was a standard undertaking made by respondent in negotiations with various Indian tribes and groups subjugated and placed on reservations during this period. Facilities so limited might have been adequate to provide service for, and instruction to, tribes and groups of limited numbers and confined to small reservations, but said facilities were patently inadequate for petitioner's members who were widely dispersed over a large territory. Even such inadequate facilities were not properly furnished nor properly equipped for several years after the execution of the said treaty.

25.

WHEREFORE, as a sixth claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Article III should have been revised on the grounds of mutual mistake in that the provisions thereof were wholly

inadequate to accomplish the purpose mutually intended and understood, and in that the provisions as set forth in said treaty constituted a deception and an illusion of consideration wholly misleading to petitioner. Said treaty should have provided for the construction of at least one warehouse, one carpenter shop, one blacksmith shop and one chapel for each 1,000 Navajos, namely, for not less than 10 of each such structures at various places over said reservation accessible to the said Navajos.

(b) Respondent failed and neglected to discharge the obligation imposed by the said Article III, revised or not revised, the same constituting a breach of the Treaty of 1868, all operating to petitioner's great loss and damage.

Seventh Claim

(Tribal funds; fiduciary relationship)

26.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, 22, and 24, and further respectfully represents and alleges as follows:

At all times since the respondent took jurisdiction over the petitioner and asserted sovereignty over petitioner's homeland from and after the Treaty of Guadalupe Hidalgo proclaimed in 1846, petitioner's property and funds have been in the care, custody, and jurisdiction of the respondent. Respondent has at all times owed to the petitioner that high degree of fiduciary duty and accountability commonly associated with the relationship of guardian and ward as hereinabove alleged, but respondent has never rendered to petitioner a true and complete accounting for all transactions carried out by the respondent, its officers, agents, and employees, in receiving and disbursing income and receipts from petitioner's property held in trust by the respondent and in expending tribal funds, and there were many instances of improper or wrongful use or expenditure of such funds by the respondent for other than tribal purposes.

27.

WHEREFORE, as a seventh claim petitioner alleges that respondent has failed, neglected, and refused to abide by the terms of the aforesaid Treaty of 1868, has broken the terms thereof, has departed from standards of fair and honorable dealing, and has violated its duties as guardian for the petitioner, in the following respects:

(a) Respondent has through its agents and officers so managed petitioner's tribal funds and assets that the said tribal funds and assets have been wasted and dissipated, all to petitioner's great loss and damage.

(b) The President of the United States has from time to time designated lands, and the Congress of the United States has from time to time appropriated funds, for the use and benefit of petitioner's members. Various goods, revenues, earnings, and payments have come into the possession of respondent's agents and employees as trustees for petitioner's members. Respondent has failed and neglected to account adequately or correctly to petitioner for such receipts, allocations, disbursals, and disposal of such aforesaid lands, funds, goods, revenues, earnings, and payments, the same being in the possession and control of respondent.

(c) No general accounting has ever been submitted to petitioner by the respondent setting forth all of the transactions and items for which tribal funds, or receipts and disbursements for tribal lands and properties, have been expended by respondent. Various instances of misappropriations and mismanagement on the part of respondent's agents and employees, and by other persons acting with the knowledge of and in collusion with the said agents and employees, have occurred from time to time in amounts presently unknown and which can only be revealed by a general accounting, all to the great damage and loss of the petitioner.

Eighth Claim

(Agreement for service in Apache wars)

28.

Petitioner restates and reaffirms each and every allegation of paragraphs 1 through 9, 11 through 15, 17 and 18, 20, 22, 24, and 26, and further respectfully represents and alleges as follows:

During the year 1886 the respondent, being engaged in war against the Apache Tribe of Indians, solicited members of petitioner's tribe to serve as scouts, reserves, and in other supporting capacities with its armed forces. Petitioner's chiefs and head men agreed with respondent's military officers to provide guides and scouts to serve as aforesaid upon condition that respondent return to petitioner its homelands "to the East," which phrase meant, and was understood by all parties to mean, the lands described in paragraph 5 above. Respondent's officers, purporting to act for and bind respondent, accepted this condition, and petitioner's members risked their lives and rendered extensive and valued services to respondent in said wars in reliance on said promises.

29.

WHEREFORE, as its eighth claim petitioner alleges that respondent has refused and failed to return petitioner's homelands, or to compensate petitioner for their value, thereby violating the said promise and agreement of 1886 which petitioner's members had faithfully and diligently acted upon.

30.

The foregoing averments and claims summarize a long record of wrongful acts and omissions on the part of respondent, hitherto unredressed.

WHEREFORE, your petitioner requests a full accounting from the United States of America, and prays judgment in favor of the Navajo Tribe of Indians against the United States of America in an amount to be determined by the fair value of the lands wrongfully taken from petitioner, plus fair and

honorable rectification of, and compensation for, the various breaches, defections, wrongs, departures from standards of fair and honorable dealings, and violations of the duties of respondent as guardian, all as enumerated and described herein, less counterclaims and offsets, if any, together with interest from the respective dates due, at rates to be determined by law, and for the costs of this action, together with such other, further, and general relief as to the Commission may seem just and warranted.

NORMAN M. LITTELL,
S. KING FUNKHOUSER,
RUFUS G. KING, JR.,
Attorneys for Plaintiff,
1422 F Street, N. W.,
Washington 4, D. C.

APPENDIX A

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS

(Ratified by the Senate September 9, 1850;
Proclaimed by the President September 24, 1850)

The following acknowledgements, declarations, and stipulations, have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fe, in New Mexico, representing the United States of America, and Mariano Martinez, Head Chief, and Chapitone, second Chief, on the part of the Navajo tribe of Indians.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

II. That from and after the signing of this treaty, hostilities between the contracing parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by

other persons or powers in amity with the said States, shall be referred to the government of said States for adjustment and settlement.

III. The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

VI. Should any citizen of the United States or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

IX. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

X. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said government may deem meet and proper.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places,

to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. WASHINGTON, [L.S.]
Brevet Lieutenant-Colonel Commanding

JAMES S. CALHOUN, [L.S.]
Indian Agent, residing at Santa Fe.

MARIANO MARTINEZ, his x mark, [L.S.]
Head Chief.

CHAPITONE, his x mark, [L.S.]
Second Chief.

J. L. COLLINS.
JAMES CONKLIN.
LORENZO FORCE.
ANTONIO SANDOVAL, his x mark.
FRANCISCO JOSTO, his x mark.
Governor of Jemez.

Witnesses—

H. L. KENDRICK, *Brevet Major, U.S.A.*
J. N. WARD, *Brevet 1st Lieut. 3d Inf'ry.*
JOHN PECK, *Brevet Major U.S.A.*
J. F. HAMMOND, *Assistant Surg'n U.S.A.*
H. L. DODGE, *Capt. comd'g Eut. Rg's.*
RICHARD H. KERN.
J. H. NONES, *Second Lieut. 2d Artillery.*
CYRUS CHOICE.
JOHN H. DICKERSON, *Second Lieut. 1st Art.*
W. E. LOVE.
JOHN G. JONES.
J. H. SIMPSON, *First Lieut. Corps Top. Engrs.*

APPENDIX B

TREATY WITH THE NAVAJO INDIANS.
June 1, 1868.

(Ratified July 25, 1868; Proclaimed August 12, 1868)
Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:—

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws, and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under

this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Canon-de-Chilly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children

can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English eduction shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named,

on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian—each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may

range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood

or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article ..... of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will

not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, *Chief.*	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GANADO MUCHO.	his x mark.

COUNCIL.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO:	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUEKO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.

B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.

J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.

THEO. H. DODD,
U. S. Indian Ag't for Navajos.

CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.

JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.

J. C. SUTHERLAND,
Interpreter.

WILLIAM VAUX,
Chaplain, U. S. A.

APPENDIX D

Special Claims Contract

THIS AGREEMENT, made the 1st day of July, 1968, at Window Rock, Arizona between Raymond Nakai, Chairman of the Navajo Tribal Council, acting on behalf of the Navajo Tribe of Indians (hereinafter designated as the TRIBE), under authority vested in him by Resolution CAP-56-68 of the Navajo Tribal Council adopted on April 24, 1968, attached to and made a part hereof, and Harold E. Mott, Attorney at Law, of Albuquerque, New Mexico, and Window Rock, Arizona (hereinafter designated as the ATTORNEY),

Witnesseth

1. *Employment.* The TRIBE has certain claims pending before the Indian Claims Commission, identified as Docket Numbers 229 (presently consolidated with Docket Nos. 196, 227, 266, 91, 30, 48, 22-D and 22-J), 299, 353 and 89 (hereinafter referred to as "the claims"), which were filed by an attorney formerly retained by the TRIBE as claims counsel who did not complete the work of their presentation and disposition. The TRIBE, desirous that said claims be diligently prosecuted to judgment or other appropriate conclusion, hereby retains and employs the ATTORNEY for a period of four (4) years, commencing on July 1, 1968, to advise and represent the TRIBE in connection with such claims, pursuant to the provisions of Section 2103 of the Revised Statutes (Section 81, Title 25, United States Code), as amended.

2. *Duties of the ATTORNEY.* It shall be the duty of the ATTORNEY to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract. He shall employ such other persons as may be required to carry out his obligations hereunder, *provided* that the cost of secretarial services and the salary

of an attorney, hired with the approval of the TRIBE to assist with the prosecution of the claims shall be deemed an expense incurred under Paragraph 4(A) of this contract.

3. *Compensation.* In consideration for the successful prosecution and conclusion of the claims, the ATTORNEY shall receive ten percent (10%) of any and all sums recovered for the benefit of the TRIBE. It is understood that said compensation shall be wholly contingent upon a recovery for the benefit of the TRIBE and shall be shared by the ATTORNEY and other attorneys, if any, determined to be entitled to a part thereof.

4. *Expenses.*

A. The ATTORNEY shall be entitled to reimbursement of the following expenses, the total of which shall be reimbursed to the TRIBE from any portion of a tribal recovery allocated to attorney fees: the cost of hiring an attorney, with the approval of the TRIBE, who shall devote such time as shall be necessary to secure the expeditious prosecution and conclusion of the claims within the period contemplated hereunder, to be compensated at the rate of twenty-five dollars ($25.00) per hour if he shall expend less than six hundred (600) hours per year, and fifteen thousand dollars ($15,000) per annum if he shall work six hundred (600) or more hours per year; cost of local secretarial service up to six thousand dollars ($6,000) a year, it being understood that any amounts paid for such service in excess of this amount including salary or bonuses shall be paid in their entirety by ATTORNEY; three-fourths (3/4) cost of office not to exceed three thousand dollars ($3,000) expense to TRIBE a year; and three-fourths (3/4) of all miscellaneous expenses included in daily office maintenance including, but not limited to supplies, postage, local telephone, stamps and like expenses, the cost to the TRIBE not to exceed five thousand dollars ($5,000) a year. Included in this figure shall be furniture not furnished by ATTORNEY. Such additional

furniture and equipment shall be furnished by TRIBE and the ownership thereof shall be in and remain in the TRIBE and become its exclusive property.

B. The ATTORNEY shall also be reimbursed for all necessary and proper expenses incurred in connection with the performance of his duties hereunder, including, but not limited to travel expenses (including mileage at the rate of ten cents (10¢) per mile when privately-owned automobile is used), long distance telephone and telegraph tolls; taxi fares, notary fees, costs of printing, reproducing and purchasing documents, and cost of stenographic services incurred while in travel status, *provided* that the ATTORNEY shall not be deemed to be in travel status when in or traveling between the claims office and Window Rock, Arizona. Said expenses shall not be reimbursed to the TRIBE by the ATTORNEY and shall not exceed the sum of twelve thousand dollars ($12,000) per year, except for such additional amounts as may be authorized by the TRIBE and approved by the Secretary of the Interior or his authorized representative (hereinafter designated as the SECRETARY).

C. The expenses enumerated herein with the exception of the salary of the secretary shall be reimbursed to the ATTORNEY only upon presentation of itemized and verified statements approved by the SECRETARY or his designee and the TRIBE, and accompanied by proper vouchers evidencing the actual expenditure thereof, except for expenditures where no vouchers are issued, such as tips, taxi cab fares, meals and like expenditures. The salary of the secretary shall be paid out of the fund established for claims expenses on IBM payroll cards.

D. Payment of expenses and compensation under this contract shall be contingent upon the availability of tribal funds or appropriation by the Congress of the United States of tribal funds held to the credit of the TRIBE.

5. *Reports.* Within twelve (12) months of the date of this contract, the ATTORNEY shall furnish a written report to the TRIBE and SECRETARY upon the status of the claims, setting forth the amount and nature of each claim, the issues of fact and law involved, an assessment of the work completed and remaining to be done, an estimate of the time that will be required to secure final judgment or other appropriate disposition, and a program for its prosecution. Such report shall be supplemented each six (6) months throughout the term of this contract.

6. *Compromises and Settlements.* Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the TRIBE and the SECRETARY.

7. *Assignments.* No assignment of the obligations of this contract, in whole or in part, and no assignment or encumbrance of any interest in the compensation to be paid herein shall be made without the consent, previously obtained, of the TRIBE and the SECRETARY; any such assignment or encumbrance in violation of the provisions of this paragraph, shall operate to terminate this contract. In the event of such termination, no person having any interest in this contract or in the compensation provided hereunder shall be entitled to any compensation whatsoever for services rendered subsequent to the date of termination.

8. *Termination.* This contract may be terminated at any time by either party upon ninety (90) days' written notice to the other party and the SECRETARY. This contract may also be terminated for cause by the SECRETARY after a hearing on reasonable notice. If the SECRETARY finds that the interests of the TRIBE so require, he may suspend this contract and the payment of all amounts due the ATTORNEY hereunder, pending a hearing which shall be held without unreasonable delay.

/s/ RAYMOND MAKAI
Raymond Makai
Chairman of the Navajo Tribal Council

/s/ HAROLD E. MOTT
Harold E. Mott

Approved this 21st day of November 1968 pursuant to letter dated November 15, 1968, signed by Assistant Secretary Anderson.

/s/ GRAHAM HOLMES
Graham Holmes
Area Director

August 22, 1968

Memorandum to Contract Files for Navajo Cases in Dockets Numbered: 69, 229, 299, 353

From: Donald Hyde

Mr. Harold E. Mott, General Counsel for the Navajo Tribe of Indians, was elected Claims Attorney for the Navajo Tribe by the Navajo Tribal Council on April 25, 1968 and a contract of employment between Mr. Mott as such claims attorney and the Navajo Tribe was executed by the parties on June 6, 1968. This contract of employment, however, was disapproved by the Department of the Interior. An Assistant Secretary of the Interior advised Mr. Mott and the Tribe, by letter, of certain amendments that Mr. Mott and the Tribe could make that would make the contract acceptable to the Department, so Mr. Lovell of the Bureau of Indian Affairs advised the Commission today (by telephone). Mr. Lovell thought it might be a matter of a few weeks before the contract will be eventually approved (after appropriate amendments are made in it).

APPENDIX E

BEFORE THE INDIAN CLAIMS COMMISSION

No. 69

THE NAVAJO TRIBE OF INDIANS, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Defendant*

First Amended Petition

To The Honorable Commissioners
Of The Indian Claims Commission:

The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth and eighth claims.

Respectfully submitted,

/s/ HAROLD E. MOTT
Harold E. Mott
First National Bank Bldg.—East
Suite 304
5301 Central Avenue, N.E.
Albuquerque, New Mexico 87108

Claims Attorney,
Navajo Tribe of Indians
Attorney of Record

APPENDIX F

BEFORE THE INDIAN CLAIMS COMMISSION

Docket Nos. 69, 299 and 353

THE NAVAJO TRIBE, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

Decided: January 23, 1975

Appearances:

William C. Schaab, Attorney for the Plaintiff.

Dean K. Dunsmore, with whom was Assistant Attorney General,
Wallace H. Johnson, Attorneys for Defendant.

Opinion of the Commission

Kuykendall, Chairman, delivered the opinion of the Commission.

The Commission has before it plaintiff's motion of July 1, 1974, to amend the petitions in Dockets 69, 299 and 353, defendant's response thereto, and plaintiff's reply to the response. In addition, we have before us defendant's motion for final judgment, and plaintiff's response. Since these motions deal with related issues, they will be decided together.

Plaintiff originally asserted eight claims for relief in its petition in Docket 69, which was filed on July 11, 1950. Each claim contained allegations of certain facts and wrongdoings, and each was followed by a paragraph stating plaintiff's legal conclusions arising from the preceding allegations. Claims 1 through 6 and claim 8 pertain to various treaties and agreements between the parties which were

concluded in the nineteenth century. Claim 7 is a request for a general accounting.[1]

In an amended petition, filed October 1, 1969, plaintiff deleted certain of the conclusory paragraphs of its original petition, and stated that it was thereby withdrawing from consideration claims 1 through 6 and claim 8. However, it did not delete any of the allegations of fact supporting the claims.

Plaintiff's motion to amend which is now before us was filed following a change of counsel for plaintiff in September 1973. This motion proposes to reformulate the conclusory paragraphs of claims 1 through 6 of the original petition and it seeks permission to amend the seventh claim by adding thereto a prayer for supplementation of defendant's 1961 accounting report. Plaintiff also requests permission to amend the petitions in all three dockets by including a request that defendant's accounting report be extended beyond August 13, 1946, as to wrongs occurring before that date and continuing after it.

Plaintiff's Motion to Reformulate Claims 1 Through 6

Defendant contends that as a result of plaintiff's amended petition of 1969, the proposed reformulated claims have nothing to which they can relate back, and argues that as a consequence plaintiff's motion to amend must be denied. However, as we have observed above, plaintiff's first amended petition, which purported to withdraw seven of plaintiff's claims,[2] did not delete the allegations of fact

[1] Since Dockets 299 and 353 also present accounting claims, and defendant filed one accounting report for all three dockets, we consolidated the dockets. 31 Ind. Cl. Comm. 40 (1973). For a history of the dockets see our discussion therein.

[2] The attorney contract in effect with the Navajo Tribe at the time of the amended petition of 1969 required that any adjustment of plaintiff's claims by plaintiff's attorneys would be subject to

which were the substance of those claims. Moreover, plaintiff's seventh claim, which clearly remained after the amended petition of 1969 was filed, stated that plaintiff "restates and reaffirms each and every allegation of fact" of the original petition.

Therefore, since plaintiff's proposed reformulated claims are based on allegations of fact which have never been withdrawn, we will grant plaintiff's motion of July 1, 1974, to amend the petitions.

Defendant's Motion for Final Judgment

Defendant's motion for dismissal of claims 1 through 6 and claim 8 in Docket 69 is grounded on plaintiff's purported withdrawal of these claims by the filing of its amended petition in 1969.

The newly amended petition which we are permitting to be filed will supersede the 1969 amended petition which is the petition to which defendant's motion is directed. For this reason, as well as the reasons set forth above for granting plaintiff's instant motion to reformulate its claims, we will deny defendant's motion for final judgment as to the claims 1 through 6 and claim 8.

Plaintiff's Motion to Amend Seventh Claim

This motion requests permission to amend the seventh claim in Docket 69 by adding a prayer that further information be supplied in the accounting report. Defendant's response to plaintiff's motion does not address itself to this issue.

Plaintiff's motion is not in accord with the proper procedure in accounting cases. *See, e.g., Blackfeet and Gros*

the approval of the tribe. The record does not indicate that this requirement, which would presumably be applicable to an amendment withdrawing several claims, was met.

Ventre Tribes v. *United States,* Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65 (1973), and cases cited therein; *Sioux Tribe* v. *United States,* Docket 114 *et al.,* 12 Ind. Cl. Comm. 541 (1963). After defendant has filed its accounting report, amendments to plaintiff's petition are usually no longer necessary. *Ft. Peck Indians* v. *United States,* Docket 184, 34 Ind. Cl. Comm. 24, 55 (1974).

The appropriate procedure is for plaintiff to file amended or supplemental exceptions to defendant's accounting report, or to move for a supplemental accounting. *See, e.g., Sioux Tribe* v. *United States,* Docket 119, 34 Ind. Cl. Comm. 230 (1974) (discussions of exceptions No. 3 and No. 13); *Blackfeet and Gros Ventre Tribes, supra,* at 67. Plaintiff has already indicated its intention of filing supplemental exceptions to the accounting. We therefore will deny plaintiff's motion. We further discuss below, the matter of supplemental accountings.

Plaintiff's Motion for Post-1946 Accounting

Finally, plaintiff requests an amendment which would contain a request for a supplemental accounting in all three dockets from August 13, 1946, to date. As we have noted above, such a motion is not now appropriate.

Furthermore this question was raised by plaintiff previously herein, and has been discussed and disposed of by the Commission. See 31 Ind. Cl. Comm. at 53. As we stated there, the United States will be ordered to supplement its accounting beyond August 13, 1946, only after it has been disclosed that defendant was guilty of pre-1946 wrongdoings which continued after that date.

For the above reasons plaintiff's motion to amend the petitions in all three dockets so that they include requests for an accounting from August 13, 1946, to date will be denied without prejudice.

Future Proceedings

Defendant has included in its response to plaintiff's motion a request that plaintiff be precluded from filing further exceptions to the accounting report. Defendant apparently has in mind a motion filed by plaintiff on December 17, 1973, which requested six months to file supplemental exceptions. None have yet been filed.

Since present counsel for plaintiff now has had adequate time to become familiar with these dockets and the applicable law, he should be able to act promptly. We will therefore grant plaintiff until February 19, 1975, within which to file any amended or supplemental exceptions to defendant's accounting report.

Plaintiff's claims 1 through 6, and claim 8, in Docket 69 are not accounting matters and they therefore will be separated from the consolidated accounting claims in Dockets 69, 299 and 353.

/s/ JEROME K. KUYKENDALL
Jerome K. Kuykendall, Chairman

We concur:

/s/ JOHN T. VANCE
John T. Vance, Commissioner

/s/ RICHARD W. YARBOROUGH
Richard W. Yarborough, Commissioner

/s/ MARGARET H. PIERCE
Margaret H. Pierce, Commissioner

/s/ BRANTLEY BLUE
Brantley Blue, Commissioner

APPENDIX G

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

No. 69

(Claims 1 through 6 and Claim 8)

(Liability Claims)

(Filed January 23, 1978)

THE NAVAJO TRIBE OF INDIANS

v.

THE UNITED STATES

Indians; relation back of petition amendments to avoid statute of limitations bar; estoppel through treaty violations by tribe; trespass of aboriginal lands; fair and honorable dealings coverage; specificity requirements for petition; fiduciary relationship; individual versus tribal claims; lack of jurisdiction to invalidate treaty; jurisdiction to revise treaty; educational breach of treaty; prior adjudication as to mineral resources; facilities breach of treaty; Act restricted to monetary relief.

William C. Schaab, attorney of record, for plaintiff. *Rodney, Dickason, Sloan, Akin & Robb, P.A.,* of counsel.

Dean K. Dunsmore, with whom was *Assistant Attorney General Peter R. Taft,* for defendant.

Opinion on Motion to Dismiss or for More Definite Statement *

BERNHARDT, *Trial Judge:* All briefs on the defendant's combined motion were filed with the Indian Claims Commission and were pending without ruling when jurisdiction of the case was transferred to the Court of Claims on December 29, 1976, pursuant to Pub. L. 94-465 (90 Stat. 1990). Upon transfer to the court the case was assigned to the trial division for initial action, and by it referred to the above trial judge before whom the motion now awaits ruling.

The dual purpose motion is addressed to the Second Amended Petition filed April 12, 1976. In the introduction of its specific responses thereto, the plaintiff contends that the defendant's motion is dilatory and proscribed by the Commission's General Rules of Procedure (GRP) 6(c) providing that "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." The plaintiff submits that the defendant should first file its answer to the petition and thereafter test out matters of sufficiency of pleadings by means of a motion for summary judgment. In the discussion which follows the Rules of this court shall control as it is the current forum, although in respects here relevant our Rules, the GRP, and the Federal Rules of Civil Procedure (FRCP) are identical.

In reply to the plaintiff's response the defendant contends that GRP 6(c), counterpart of our Rule 31(b) and FRCP 7(c), is not applicable, and that the defendant's motion is not dilatory.

Our Rule 31(b), copied from FRCP 7(c), is not applicable. FRCP 7(c) (and by analogy our Rule 31(b)), was designed to abolish preexisting technical rules by which certain defenses were formerly raised. Our Rule 38(b) (paralleling FRCP 12(b) and GRP 11(b)) permits certain

* The opinion and conclusion of law are submitted pursuant to Rule 54(a). The necessary facts are stated in the opinion.

defenses to be made by motion filed prior to the filing of an answer, including lack of jurisdiction over the subject matter and failure to state a cause of action for which relief can be granted. Our Rule 38(e), mirroring FRCP 12(e) and GRP 11(e), permits a pleader to move for a more definite statement of an ambiguous or vague antecedent pleading so that a suitable response may be framed.

From the standpoint of the rules, therefore, the fact that no answer has yet been filed to plaintiff's Second Amended Petition presents no technical bar to the filing of defendant's motion, provided the motion itself is not dilatory, which the plaintiff maintains but the circumstances negate. As originally filed in 1950 the petition contained eight claims. By permission of the Commission no answer was filed due to the intervention of accounting procedures, a protracted siege of motions, a deferred intention to file an Amended Petition, and finally the filing on October 1, 1969, of a First Amended Petition which withdrew the prayers for relief in all of the original eight claims except the accounting claim. Defendant answered the First Amended Petition promptly on November 4, 1969. New counsel for plaintiff was permitted on January 23, 1975, over objection of defendant, to file a Second Amended Petition "reformulating" the previously withdrawn non-accounting claims First through Sixth (35 Ind. Cl. Comm. 307 (1975)). The Second Amended Petition itself was not filed until April 12, 1976, due to much intervening activity in the case, including the defendant's motion of April 1, 1975, to the Commission for certification of this issue to this court, which was denied by the Commission's order of July 9, 1975. (36 Ind. Cl. Comm. 215 (1975).) Instead of filing an answer to the Second Amended Petition the defendant elected to file its present motion on June 3, 1976.

The plaintiff alleges that the pending motion is defendant's first effort to attack the legal sufficiency of non-accounting claims First through Sixth, and the Eighth

Claim, which were made in the original petition and are resurrected in the Second Amended Petition, after a 5½ year absence, but the record shows otherwise. On July 9, 1963, the defendant challenged the sufficiency of the non-accounting claims in a motion to sever or dismiss them but, after plaintiff's motion for an extension of time to respond, the Commission on August 23, 1963, denied defendant's motion without prejudice to its later refiling. The 27-year voyage of the case from there to here has been protracted but not quiescent. A glance at the voluminous docket entries, and the mounting pile of pleadings does not indicate that defendant has been dilatory in restating in its present motion a challenge to legal sufficiency whose gist was raised before but deferred.

Overview of Pleadings

At the opening of each of the seven claims following the First Claim in the Second Amended Petition (hereafter constantly termed "the petition") the plaintiff formally restates and reaffirms by reference all of the allegations in the paragraphs supporting each of the preceding claims, but not of course the prayers for relief in those preceding claims, with one exception. While each numbered claim in the petition has at the top a parenthetical title ostensibly denominating the scope of the particular claim (the titles are summarized in a table of contents accompanying the petition), in actuality there is much duplication and overlapping of allegations in the successive claims. Some of the claims pray for relief which infringes on the relief demanded or available in docket 229 (still pending before the Commission and involving alleged undercompensation for aboriginal lands ceded by plaintiff to the United States under the Treaty of 1868), or to be dealt with separately in the accounting claims now before the court in dockets 299, 353, and the Seventh Claim of docket 69. The extent of overlap and duplication with docket 229 and with the

separated accounting claims (dockets 299, 353, and the Seventh Claim of docket 69) will be discussed in considering the defendant's motion to dismiss particular claims on that ground.

The eight claims in the petition collectively allege about seven major causes of action involving alleged violations of plaintiff's 1850 and 1868 treaties,[1] title to aboriginal and reservation lands under the 1850 Treaty and reservation lands under the 1868 Treaty, coerced negotiation of 1868 Treaty, mistreatment of the Indians in violation of fair and honorable dealings and guardianship standards in various ways (sanctioned or encouraged trespassing by third parties, denial of guarantees relating to education, health, and welfare, removal of minerals, agricultural assistance, breach of treaty obligation to construct facilities, breach of alleged agreement to return homelands as compensation for scout services rendered in 1886 War against the Apaches, damage to agricultural and grazing land), and the demand in the Seventh Claim for accounting. The First through Sixth Claims are the vital claims to consider at this time, since the Seventh Claim relating to accounting is to be separately considered with the accounting claims constituting dockets 299 and 353 (also before the court on transfer from the Commission); the Eighth Claim was purportedly dismissed by the Commission yet physically reappears in the latest petition without Commission permission being visibly requested.[2] However, some mention will be made of the Sev-

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[1] Treaty of September 9, 1849, 9 Stat. 974, 2 Kappler 583, ratified September 24, 1850 (hereafter "Treaty of 1850"). Treaty of June 1, 1868, 15 Stat. 667, 2 Kappler 1015, ratified July 25, 1868 (hereafter "Treaty of 1868").

[2] In the discussion under Part XVIII of defendant's motion, *infra*, which moves the dismissal of plaintiff's Eighth Claim, we discuss in detail the confusing procedural posture of the Eighth Claim, which survives in the petition due to the Commission's gratuitous ruling (36 Ind. Cl. Comm. 108 (1975)), despite the plaintiff's apparent abandonment.

enth and Eighth Claims in this opinion to the extent they are addressed by the defendant's motion.

Some of the series of eighteen roman numeral Parts of defendant's motion to dismiss present several separate grounds for the dismissal of each or parts of each of the eight claims in the petition. Thus, Part I of defendant's motion seeks dismissal of all seven non-accounting claims for procedural reasons. Parts II through IV seek dismissal or a more definite statement as to the First Claim. Parts V through VII are addressed to the Second Claim, Parts VIII and IX to the Third Claim, Parts X and XI to the Fourth Claim, Parts XII through XIV to the Fifth Claim, Parts XV and XVI to the Sixth Claim, Part XVII to the Seventh Claim, and Part XVIII to the Eighth Claim. There are collectively about eighteen grounds urged for dismissal, but no useful purpose would be served by describing them in general terms at this point since they will be explained in detail as each Part of defendant's motion unfolds.

Part I

In Part I of its motion the defendant requests dismissal of all but the Seventh Claim of plaintiff's petition because the other claims were voluntarily withdrawn from the original petition by the First Amended Petition and then, with sanction of the Commission, by its order of January 23, 1975 (35 Ind. Cl. Comm. 315), realleged in the latest petition as previously noted. Defendant claims that they are barred by the applicable statute of limitations, 25 U.S.C. § 70k, which requires such claims to be filed by August 13, 1951. To this extent the motion filed June 3, 1976, constitutes, in effect, defendant's belated motion for reconsideration by the Commission of its order of January 23, 1975, *supra*. The plaintiff responds that GRP 33(a) precludes a motion for rehearing filed beyond the 30 days allowed in that rule. GRP 33(a) is directed to rehearing of the Commission's "conclusions on its findings of fact", and thus does

not literally apply to a ruling on a question of law such as propriety of permitting petition amendments to reallege previously withdrawn claims that might otherwise be time-barred. However, GRP 33(b) applies to rehearing on errors of law, and it clearly makes defendant's motion untimely.

Despite that fact, we shall explore the grounds. The reasons given by the Commission for permitting reinstatement of the withdrawn claims were two: (1) the First Amended Petition withdrew only the prayers for relief and left standing the factual averments supporting the withdrawn prayers; (2) the Seventh Claim relating to accounting, which was left undisturbed in the First Amended Petition, formally restated and reaffirmed the allegations of fact in the other claims in the original petition. Hence, ruled the Commission, "since plaintiff's proposed reformulated claims [in the latest petition] are based on allegations of fact which have never been withdrawn, we will grant plaintiff's motion of July 1, 1974, to amend the petition." This despite the earlier recognition by the Commission that all non-accounting claims First through Sixth, and the Eighth had been withdrawn. 31 Ind. Cl. Comm. 40, 41 (1973).

At the request of the trial judge for clarification, the parties have filed supplemental briefs as to Part I of Defendant's Motion to Dismiss, in which the circumstances of the withdrawal and later reinstatement of the non-accounting claims are explored and authorities are cited to support competing views as to the validity of the Commission's authorization for the reinstatement of the withdrawn claims by allowing the filing of the latest petition.

The following facts are stated by plaintiff: The resignation of plaintiff's original counsel (Mr. Littell) on February 20, 1967, was followed on November 14, 1967, by the filing of defendant's motion to require plaintiff to break down the original petition into separate petitions so as to provide greater specificity in describing the claims or, in the alternative, to dismiss the petition. At that time plaintiff had no

counsel and did not have new counsel to succeed Mr. Littell until on or about November 21, 1968, when Harold Mott, Esquire, was engaged under contract as plaintiff's counsel. In the meantime defendant filed on March 11, 1968, a motion to dismiss for failure to prosecute which, at the instance of Mr. Mott, was denied by Commission order of December 23, 1968. Mr. Mott sought an extension of time to respond to defendant's motion of November 14, 1967, and was on December 23, 1968, given until September 30, 1969, to file an amended petition, which was the request made by him in his opposition to defendant's motion to dismiss for want of prosecution.

For reasons which are not entirely clear, but allegedly related to Mr. Mott's inability to obtain access to Mr. Littell's records, plus the pressure of time and dearth of resources, instead of making the claims of the original petition more specific by dividing them into separate petitions as defendant had requested, or in some other fashion, Mr. Mott on October 1, 1969, filed a First Amended Petition which withdrew the prayers for relief in all non-accounting claims First through Sixth, and the Eighth, in the original petition. With this the defendant allowed its motion of November 14, 1967, to lapse without action, as though moot, which indeed it seemed to be at that juncture.

Neither the reason nor authorization for Mr. Mott's action in withdrawing all non-accounting claims is explained in the record. Speculatively, in part it may have been due to Mr. Mott's realization that the major demands for relief in docket 69 duplicated demands in docket 229. (Docket 229 has been retained by the Indian Claims Commission and is in the concluding phases of determination.) According to the Commission (35 Ind. Cl. Comm. 307 (1975)), the record does not indicate whether Mr. Mott had met the requirement of his attorney contract with the tribe that any adjustment of its claim by counsel (such as voluntary withdrawal of previously pleaded claims) would be subject to tribal

approval. The defendant had full notice of Mr. Mott's contract with the tribe, and thus is charged with knowledge of the extent or absence of his authority thereunder to withdraw claims without tribal approval. From this the plaintiff contends that defendant is estopped from relying on the acts of an agent (Mr. Mott) in withdrawing claims without tribal approval when it (the defendant) knew that the acts were beyond the scope of Mr. Mott's agency powers, if in fact they were.

The defendant contends that the Commission erroneously permitted the reassertion of the withdrawn claims by the plaintiff filing a Second Amended Petition long after the claims had been barred by the statute of limitations expiring August 13, 1951, per 25 U.S.C. § 70k. In its Supplemental Response the plaintiff relies on the recognized policy of liberality in permitting amendments to petitions under the Indians Claims Commission Act, citing *United States* v. *Lower Sioux Indian Community in Minn.*, 207 Ct. Cl. 492, 519 F. 2d 1378 (1975). There the court upheld the Commission in allowing an amendment adding to a petition claims for the taking of land to a claim for a general accounting, even after a stipulation of settlement as to all claims except the accounting claim had been entered into. The court's action was based upon GRP 13(c) which, consistent with the statute, "requires the test of notice if circumvention of a time limitation is to be permitted on the theory of relation back. In fact ,the rule defines that notice, permitting 'relation back', is present only if the amendment arose out of the same 'conduct, transaction, or occurrence' as presented in the original pleadings." *Id.*, at 503. The court felt that the original petition provided the requisite notice of the enlarged claim. See also *Snoqualmie Tribe of Indians* v. *United States,* 178 Ct. Cl. 570, 372 F.,2d 951 (1967), *United States* v. *Northern Paiute Nation,* 183 Ct. Cl. 321, 393 F. 2d 786 (1968), and *United States* v. *Northern Paiute Nation,* 203 Ct. Cl. 468, 490 F. 2d 954 (1974). In the *Snoqualmie*

case the court held that the term "presented" in the limitation statute, 25 U.S.C. § 70k, "should be read liberally to permit an amended pleading to relate back where there is sufficient notice." In the two *Northern Paiute* cases the court allowed second and third amendments to the petition to add additional land to the claim area and to demand compensation for the removal of resources. If on the principal of relation back a new party and a new cause of action can be introduced in a case by amendment after expiration of the statutory period for the filing of claims, as in the *Snoqualmie* and *Paiute* cases, there is less reason to deny the revival of original claims that were previously dismissed under the circumstances described in the present case. This is particularly true where, as here, certain of the realleged claims may be intimately related to the subject matter of extant claims for accounting still in process, and to some extent to the claims in docket 229 pending before the Commission, thus providing the requisite notice to meet the relation back principal in GRP 13(c). No real disadvantage to the defendant can be seen in permitting the amendments to survive for the reasons assigned in Part I of the motion.

Part I of the defendant's motion for dismissal is denied on the merits, and not merely because it is untimely.

Supreme Court, U.S.
FILED
JAN 9 1980
MICHAEL RODAK, JR., CLERK

No. 79-747

In the Supreme Court of the United States

OCTOBER TERM, 1979

NAVAJO TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims, dated June 13, 1979 (Pet. App. A), is reported at 601 F. 2d 536 (1979). The order of the Court of Claims on petitioner's motion for clarification dated September 28, 1979 (Pet. App. B), is unreported.

JURISDICTION

The judgment of the Court of Claims was entered on June 13, 1979. On September 11, 1979, the Chief Justice granted an extension of time in which to file a petition for a writ of certiorari to and including November 10, 1979. The petition was filed on November 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether claims, presented by the Navajo Tribe under the Indian Claims Commission Act and voluntarily withdrawn from consideration after the applicable statute of limitations had run, could be reinstated approximately five years later.

STATUTE INVOLVED

The applicable statute of limitations, Section 12 of the Indian Claims Commission Act, 25 U.S.C. 70k, provides:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

Section 15 of the Indians Claims Commission Act, 25 U.S.C. 70n, governing the selection and compensation of Claims Act attorneys and the terms of their practice, is set out at Pet. 3.

STATEMENT

On July 11, 1950, the Navajo Tribe filed a petition before the Indian Claims Commission, assigned Docket No. 69, setting out eight separate claims (Pet. App. C). The first claim alleged a violation of the United States' obligation to protect the tribe's property rights pursuant to the Treaty of September 24, 1850. The second and third claims alleged fraud and duress, unconscionable consideration and unilateral mistake in the execution of the Treaty of August 12, 1868, or alternatively, that the treaty had been violated by the government's failure to

provide agricultural lands and by its infliction of damage to reservation lands. The fourth claim alleged a failure to provide educational and other services pursuant to the 1868 treaty. The fifth claim alleged that the United States exploited and allowed others to exploit the tribe's natural resources without adequate consideration, thereby violating its fiduciary duty under the 1868 treaty. The sixth claim alleged a violation of the 1868 treaty by failing to provide adequate construction of certain buildings and shops. The seventh claim was a general accounting claim. The eighth claim alleged a violation of a promise to return certain lands to the tribe in return for the Navajo's service in the Apache wars.

During August 1951, three new petitions were filed and assigned Docket Numbers 229, 299 and 353. The petition in Docket No. 229 alleged a taking based on facts originally set forth in Docket No. 69 (Pet. App. 3a). The petition in Docket No. 353 asserted a claim for mismanagement of the tribe's oil and gas resources, and the petition in Docket No. 299 alleged mismanagement of other resources (*ibid.*). No action was taken at that time with respect to Docket No. 69, even though many of the claims in it were duplicated by claims asserted in the three new petition (*ibid.*). Several years passed during which the parties focused on Docket No. 229 (Pet. 6). Then, on December 23, 1968, in response to a government request for greater specificity, the Commission ordered the tribe to file an amended petition in Docket No. 69 (Pet. App. 3a). On October 1, 1969, the Navajo filed a First Amended Petition (Pet. App. E) which in its entirety stated:

> The petition is amended by deleting paragraphs 10, 16, 19, 21, 23, 25 and 29, thereby withdrawing from consideration herein the first, second, third, fourth, fifth, sixth, and eighth claims.

Nearly five years later, the tribe moved to amend further its petition in Docket No. 69. The government cross-motion for entry of final judgment dismissing claims 1 through 6 and 8. On January 23, 1975, the Commission denied the government's motion and granted petitioner's motion to amend the petition by "reformulating" the first six claims (Pet. App. F). The government's subsequent motion to certify that ruling to the Court of Claims was denied (Pet. App. 3a).

In 1976, the government filed a motion to dismiss or for a more definite statement as to reformulated claims 1 through 6 and 8 in the Second Amended Petition (*id.* at 4a). While that motion was pending, Docket No. 69 was transferred to the Court of Claims pursuant to Pub. L. No. 94-465, 90 Stat. 1990, which provided for the termination of the Indian Claims Commission (*ibid.*).

In 1978, a Court of Claims trial judge denied the government's motion to dismiss, holding (Pet. App. G) that claims 1-6 and 8 in the Second Amended Petition related back to the original petition.[1] Upon review of that ruling, the Court of Claims held on June 13, 1979 (Pet. App. A) that the First Amended Petition (filed in 1969) had effected a voluntary dismissal of claims 1 through 6 and 8. Therefore, the claims set out in the Second Amended Petition in 1975 were "presented" then for the first time, considerably after the applicable statute of limitations had run. Consequently, claims 1-6 and 8 of the Second Amended Petition were dismissed. Thereafter, the Navajo Tribe filed a motion for clarification, alleging that the dismissed claims might be asserted as part of the surviving claim 7 in Docket No. 69. On September 28, 1979, the Court of Claims rejected

[1]The trial judge's opinion would have dismissed several of the claims on other grounds.

this contention, holding (Pet. App. B) that petitioner may pursue the dismissed claims "only if and to the extent they are also part of the claims asserted in the dockets other than docket No. 69." The petition for certiorari followed.

ARGUMENT

The decision of the Court of Claims is correct, depends largely on the particular facts of this case and lacks general importance. It is not in conflict with any decision of this Court or any appellate court and does not warrant further review.

1. Petitioner's principal contention (Pet. 10-15) is that the Court of Claims, in determining that there was a voluntary dismissal of petitioner's nonaccounting claims in Docket No. 69, misconstrued and failed to give effect to Section 6 of the Special Claims Contract between the tribe and its attorney. Section 6 of that contract (Pet. App. D) provides:

> Any compromise, settlement or other adjustment of the claims shall be subject to the approval of the Tribe and the Secretary.

Petitioner contends that since the record shows approval by neither the Tribe nor the Secretary, its attorney had no authority to withdraw the claims at issue.

The argument is misplaced. If petitioner's contention were correct, every step taken by petitioner's attorney that might affect some claim against the United States, even if made for strategic reasons, would require prior approval of the Secretary of the Interior. This would mean that the Secretary would be in a position to review strategic decisions made by legal opponents of the United States. The Court of Claims quite reasonably

construed Section 6 so as to avoid this rather curious result (Pet. App. 5a-6a):

> We construe this provision as requiring tribal and secretarial approval only of compromises, settlements, and similar adjustments of claims, *i.e.*, the termination of claims in return for some consideration given in exchange therefor. Paragraph 6 did not limit the attorney's authority to withdraw certain claims, several of which probably were duplicative of those in other dockets, for what he perceived to be sound tactical or strategic reasons. That was precisely the kind of decision the attorney would have to make in carrying out his duty under paragraph 2 of the contract "to diligently prosecute the claims and to exert his best efforts to satisfactorily conclude them within the term of this contract." Indeed, an attorney could not effectively conduct such a major Indian claims case as this if he had to obtain the prior approval of his client and the Secretary before he could take such action.

Presumably, Section 15 of the Indian Claims Commission Act authorized Indian tribes to select their own attorneys in part so that they might determine their own litigation strategy. It is not the responsibility of the Secretary of the Interior to determine what claims a tribe may present or decline to present. The Secretary's role is more limited: to assure that a tribe's attorney does not settle a claim to the disadvantage of the tribe in order to obtain a contigency fee. The Special Claims Contract was designed to guard against the latter eventuality.

2. Petitioner also argues (Pet. 12-14) that its attorney did not have express authority to withdraw claims 1-6 and 8, and that therefore his withdrawal of those claims was void. But an attorney is deemed to have implied

authority to manage his or her client's lawsuit, and the client accordingly is bound by the attorney's action. *Link* v. *Wabash R.R.*, 370 U.S. 626 (1962). "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent * * *." *Id.* at 634.[2]

3. Finally, petitioner argues (Pet. 15-19) that only the general allegations of damages were withdrawn, leaving the factual allegations untouched and the claims intact under the general prayer for relief. The Court of Claims correctly dealt with this contention (Pet. App. 4a-5a):

> Although the 1969 amended petition "deleted" only the specific paragraphs which stated the claims in some detail, and not the general factual allegations preceding those paragraphs upon which the claims were based, *the deleted paragraphs were the actual statements of the claims* [emphasis added]. Indeed, the plaintiff recognized in its 1969 amendment that by deleting those paragraphs it was "*thereby withdrawing from consideration* herein the first, second, third, fourth, fifth, sixth, and eighth *claims*."

Petitioner's suggestion that the factual allegations and the general prayer for relief were intentionally left undisturbed so as to preserve the claims studiously

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[2]Even if express tribal authority were required for the dismissal of claims 1-6 and 8, it is the tribe's burden to show that such authority was not granted (see *United States* v. *Beebe*, 180 U.S. 343, 352 (1901); *Thomas* v. *Colorado Trust Deed Funds, Inc.*, 366 F. 2d 136, 139 (10th Cir. 1966)), a burden not met here given the record's silence on this point.

ignores the plain language used by the tribe in its amended petition expressly "withdrawing" the claims "from consideration."[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1980

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[3]Of course, since Dockets 229, 299 and 353 were timely filed, petitioner remains free to litigate the extent to which the claims in those dockets overlap the claims in Docket No. 69.